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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 245

THE UNITED STATES OF AMERICA, APPELLANT

vs.

J. W. GILLILAND, RALPH GILLILAND, FRED A. WILLIAMS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS

FILED JULY 15, 1940

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1 In United States District Court for the Eastern District of Texas, Tyler Division

Cr. No. 4394

UNITED STATES OF AMERICA

vs.

J. W. GILLILAND, RALPH GILLILAND, FRED A. WILLIAMS, EUGENE P. WILLIAMS, J. H. CAMPBELL, DAVID C. MCCALEB, D. V. LOFLIN, W. H. SPARKS, H. O. RADCLIFFE, C. G. PONDER, FRANK JONES, EDDIE LAWSON, L. TOLBERT, JOE VARDEMAN, J. F. SHEPPERD, ALIAS J. F. SHEPPARD, O. L. SCARBOROUGH, A. M. PRUITT, VANCE E. POWELL, GEORGE RHODUS, EARL HENDRIX, W. C. ADAMS, FRED H. CONNALLY, HARRY L. VISER, A. H. MEADOWS, R. G. TRIPPETT, AND BELL GENERAL PIPE LINE COMPANY

Indictment

Filed Feb. 21, 1938

At a regular term of the United States District Court for the Eastern District of Texas, begun and holden, within and for the Tyler Division of said District, at Tyler, Smith County, Texas, in said division and district, on the 14th day of February A. D. 1938, the Grand Jurors of the United States of America within and for said district having been duly summoned, tried, empaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America committed within said District upon their oaths aforesaid in the name and by the authority of the United States of America, do present and find:

That one J. W. Gilliland, one Ralph Gilliland, one Fred A. Williams, one Eugene P. Williams, one J. H. Campbell, one David C. McCaleb, one D. V. Loflin, one W. H. Sparks, one H. O. Radcliffe, one C. G. Ponder, one Frank Jones, one Eddie Lawson, one L. Tolbert, one Joe Vardeman, one J. F. Shepperd, alias J. F. Sheppard, one O. L. Scarborough, one A. M. Pruitt, one Vance E. Powell, one George Rhodus, one Earl Hendrix, one W. C. Adams, one Fred H. Connally, one Harry L. Viser, one A. H. Meadows, one R. G. Trippett, and Bell General Pipe Line Company, a Texas corporation whose offices and principal place of business is at Dallas, Dallas County, Texas, said Bell General Pipe Line Company being the successor in name only, by charter amendment, to the Gilliland Pipe Line Com-

2 pany, and divers other persons whose names are to the Grand Jurors unknown and cannot be given, hereinafter referred to as Defendants, did heretofore, to wit, continuously form on or about March 1, 1935, up to on or about January 1,

1938, unlawfully, knowingly, fraudulently, wilfully, and feloniously agree, combine, confederate, and conspire among themselves and with each other, to commit divers and sundry offenses against the laws of the United States of America, to wit, to knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, false affidavits relating to matters within the jurisdiction of the Department of the Interior and the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, knowing the same to contain fraudulent and fictitious statements, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being, each of them, a Governmental Department and Agency of the United States.

The Grand Jurors further present that a more definite description of the unlawful agreement and conspiracy to commit said offenses in violation of the laws of the United States, is as follows:

That certain of the said Defendants would produce and cause to be produced oil from certain leases hereinafter described, situated in Gregg and Upshur Counties, Texas, and within jurisdiction of this Court, which oil would be produced in violation of the laws of Texas, and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases. Certain others of the said Defendants were to, without lawful authority and without approved tenders or permits of the Railroad Commission of Texas or the Federal Tender Board No. 1, of Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg, County, Texas, or cause the same to be done, and certain others of said Defendants were to refine the said unlawfully produced oil so transported, and manufacture it into contraband products at the said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of the said Defendants were to sell, ship, and deliver into interstate commerce,
3 the said contraband products so manufactured and cause the same to be done, without lawful authority and in violation of the laws of the United States.

That said Defendants would make and cause to be made, use and cause to be used false and fraudulent affidavits in, and relating to, matters within the jurisdiction of said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, knowing that said affidavits would contain fraudulent and fictitious statements, and which false affidavits would relate to and cover reports designated as

(1) Federal Form D, Monthly Producer's Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and which would purport to show the amount of petroleum oil produced from the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, the Walker-Harris Lease, Martha Dillard Survey, Gregg County, Texas, and the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas, from on or about the 1st day of March 1935, up to and including about the 30th day of June 1936; (2) Federal Form C, Monthly Pipe Line and Storage Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and which would purport to show the amount of petroleum oil received by the pipe lines and the amount of oil delivered by the pipe lines of the Gilliland Refining Company and the Gilliland Pipe Line Company, from on or about the 1st day of March 1935, up to and including about the 20th day of October 1936; (3) Federal Form A, Refinery and Reclamation Plant Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and would purport to show the amount of petroleum oil and products thereof in refinery storage at the 1st of each month, and would purport to show the amount of petroleum oil and products received each month, the amount of such materials consumed in manufacturing operations, the amount of products manufactured therefrom, and the amount of deliveries of all oil and products, said reports to be made on behalf of the Gilliland Refining Company, Gladewater, Texas, from on or about the 1st day of March 1935, up to and including about the 20th day of October 1936.

The exact place, division, and district where the said Defendants entered into said agreement, combination, confederation, and conspiracy among themselves and with each other and with divers other persons whose names are to the Grand Jurors unknown, is to the Grand Jurors unknown and cannot be given.

4 That in pursuance of the aforesaid unlawful conspiracy, confederation, and agreement between said Defendants and other persons to the Grand Jurors unknown, and to effect the object thereof the following overt acts were committed by said Defendants within the jurisdiction of this Court and within the Tyler Division thereof as follows, to wit:

1. That on or about April 20, 1935, in Gregg County, Texas, Frank Jones executed before the Defendant, E. P. Williams, Notary Public, Gregg County, Texas, an affidavit to Federal Form D, Monthly Producer's Report, of the Oil, Inc., for the month of March 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil, Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

2. That on or about May 15, 1935, Frank Jones, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report, of the Oil, Inc., for the month of April 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil, Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

3. That on or about June 5, 1935, Frank Jones, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report, of the Oil, Inc., for the month of May 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil, Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

4. That on or about July 3, 1935, Frank Jones in Gregg County, Texas, before Madge Lindsey, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report, of the Oil, Inc., for the month of June 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil, Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

5. That on or about August 3, 1935, Eddie Lawson in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report of the Oil, Inc., for the month of July 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil, Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

6. That on or about September 5, 1935, Eddie Lawson, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report, of the Oil Inc., for the month of August 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

7. That on or about October 3, 1935, Eddie Lawson, in Gregg County, Texas, before Bereth M. Parkins, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report, of the Oil Inc., for the month of September 1935, which report contained false statements as to the quantity of oil produced and delivered by said Oil Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

8. That on divers other dates thereafter, Eddie Lawson, in Gregg County, Texas, before Bereth M. Parkins, Notary Public, Gregg County, Texas, executed affidavits to Federal Form D, Monthly Producers' Reports, of the Oil Inc., for the months of October, November, and December, 1935, and the months of January, February, March, April, and May, 1936, which reports contained false statements as to the quantity of oil produced and delivered during each of said months by said Oil Inc., from the wells located upon the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas.

9. That on or about April 20, 1935, Joe Vardeman in Gregg County, Texas, before the Defendant Eugene P. Williams, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report of the Metairie Oil Corporation for the month of March 1935, which report contained false statements as to the quantity of oil produced and delivered by said Metairie Oil Corporation from the wells Located upon the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas.

6 10. That on or about May 15, 1935, Frank Jones in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report, of the Metairie Oil Corporation for the month of April 1935, which report contained false statements as to the quantity of oil produced and delivered by said Metairie Oil Corporation from the wells located upon the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas.

11. That on or about June 5, 1935, J. F. Shepperd, alias J. F. Sheppard, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report of the Metairie Oil Corporation for the month of May 1935, which report contained false statements as to the quantity of oil produced and delivered by said Metairie Oil Corporation from the wells located upon the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas.

12. That on or about July 3, 1935, August 3, 1935, and September 5, 1935, J. F. Shepperd, alias J. F. Sheppard, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed affidavits to Federal Form D, Monthly Producers' Reports of the Metairie Oil Corporation, for the months of June, July, and August, 1935, respectively, which reports each contained false statements as to the quantity of oil produced and delivered by said Metairie Oil Corporation

from the wells located upon the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas.

13. That on or about October 3, 1935, L. Tolbert in Gregg County, Texas, before Bereth M. Parkins, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form D, Monthly Producer's Report of the Metairie Oil Corporation, for the month of September 1935, which report contained false statements as to the quantity of oil produced and delivered by said Metairie Oil Corporation from the wells located upon the J. H. Sheppard Lease, T. Allen Survey, Gregg County, Texas.

14. That on various dates thereafter, L. Tolbert in Gregg County, Texas, before Bereth M. Parkins, Notary Public, Gregg County, Texas, executed affidavits to Federal Form D, Monthly Producers' Reports of the Metairie Oil Corporation, for the months of October, November, and December 1935, and the months of January, February, March, April, and May 1936, which reports each contained false statements as to the quantity of oil produced and delivered during each of said months
7 by said Metairie Oil Corporation, from the wells located upon the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas.

15. That on or about April 6, 1935, H. O. Radcliffe, in Gregg County, Texas, before the Defendant Eugene P. Williams, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form C, Monthly Pipe Line and Storage Report of the Gilliland Refining Company, Gladewater, Texas, for the month of March, 1935, which report contained false statements as to the quantity of oil received and delivered during the month of March 1935, by said Gilliland Refining Company.

16. That on or about May 10, 1935, and on or about June 5, 1935, H. O. Radcliffe in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed affidavits to Federal Form C, Monthly Pipe Line and Storage Reports of the Gilliland Refining Company, Gladewater, Texas, for the months of April and May 1935, respectively, which reports each contained false statements as to the quantity of oil received and delivered during said months by said Gilliland Refining Company.

17. That on various dates thereafter, H. O. Radcliffe in Gregg County, Texas, before Madge Lindsey, Notary Public, Gregg County, Texas, executed affidavits to Federal Form D, Monthly Pipe Line and Storage Reports of the Gilliland Refining Company, Gladewater, Texas, for the months of June, July, August, September, October, and November 1935, which reports each contained false statements as to the quantity of oil received and delivered during each of said months by said Gilliland Refining Company.

18. That on or about January 4, 1936, H. O. Radcliffe in Gregg County, Texas, before Jeanette Wallace, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form C, Monthly Pipe Line and Storage Report, of the Gilliland Refining Company, Gladewater, Texas, which report contained false statements as to the quantity of oil received and delivered during said month by said Gilliland Refining Company.

19. That on or about March 9, 1936, and April 2, 1936, H. O. Radcliffe in Gregg County, Texas, before Madge Lindsey, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form C, Monthly Pipe Line and Storage Reports of the Gilliland Pipe Line Company, Gladewater, Texas, for the months of February and March 1936, respectively, which reports each contained false statements as to the quantity of oil received and delivered during each of said months by said Gilliland Pipe Line Company.

20. That on or about May 9, 1936, O. L. Scarborough in Gregg County, Texas, before E. R. Evans, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form C, Monthly Pipe Line and Storage Report, of the Gilliland Pipe Line Company, for the month of April 1936, which report contained false statements as to the quantity of oil received and delivered during said month by said Gilliland Pipe Line Company.

21. That on or about June 9, 1936, O. L. Scarborough in Gregg County, Texas, before E. R. Evans, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form C, Monthly Pipe Line and Storage Report of the Gilliland Pipe Line Company, Gladewater, Texas, for the month of May 1936, which report contained false statements as to the quantity of oil received and delivered during said month by said Gilliland Pipe Line Company.

22. That on or about April 6, 1935, H. O. Radcliffe in Gregg County, Texas, before F. G. Hull, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form A, Refinery and Reclamation Plant Report, of the Gilliland Refining Company, Gladewater, Texas, for the month of March 1935, which report contained false statements as to the operations of said Gilliland Refining Company during said month.

23. That on or about May 7, 1935, H. O. Radcliffe in Gregg County, Texas, before F. G. Hull, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form A, Refinery and Reclamation Plant Report of the Gilliland Refining Company, Gladewater, Texas, for the month of April 1935, which report contained false statements as to the operations of said Gilliland Refining Company during said month of April 1935.

24. That on or about June 7, 1935, H. O. Radcliffe in Gregg County, Texas, before Madge Lindsey, Notary Public, Gregg

County, Texas, executed an affidavit to Federal Form A, Refinery and Reclamation Plant Report of the Gilliland Refining
9 Company, Gladewater, Texas, for the month May 1935, which report contained false statements as to the operations of said Gilliland Refining Company during said month.

25. That on or about July 6, 1935, H. O. Radcliffe, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form A, Refinery and Reclamation Plant Report, of the Gilliland Refining Company, Gladewater, Texas, for the month of June 1935, which report contained false statements as to the operations of said Gilliland Refining Company, during said month.

26. That on or about August 12, 1935, H. O. Radcliffe, in Gregg County, Texas, before Katherine C. Brown, Notary Public, Gregg County, Texas, executed an affidavit to Federal Form A, Refinery and Reclamation Plant Report, of the Gilliland Refining Company, Gladewater, Texas, for the month of July 1935, which report contained false statements as to the operations of said Gilliland Refining Company during said month.

27. That on various dates thereafter, H. O. Radcliffe, in Gregg County, Texas, before Madge Lindsey, Notary Public, Gregg County, Texas, executed affidavits to Federal Form A, Refinery and Reclamation Plant Reports, of the Gilliland Refining Company, for the months of August, September, October, and November 1935, which reports each contained false statements as to the operations of said Gilliland Refining Company, during each of said months.

28. That on or about March 5, 1936, and April 2, 1936, H. O. Radcliffe, in Gregg County, Texas, before Madge Lindsey, Notary Public, Gregg County, Texas, executed affidavits to Federal Form A, Refinery and Reclamation Plant Reports of the Gilliland Refining Company, Gladewater, Texas, for the months of February and March 1936, which reports each contained false statements as to the operations of said Gilliland Refining Company during each of said months.

29. That on or about July 28, 1936, Ralph Gilliland delivered to A. J. Sanders a check dated July 28, 1936, in the sum of Fifteen Hundred and Fifty Dollars ($1,550.00), payable to said A. J. Sanders, drawn on the Peoples National Bank of Tyler, Texas, and signed by Ralph Gilliland.

10 30. That some time during the months of April or May 1935, the exact date being to the Grand Jurors unknown, D. V. Loftin paid to J. H. Sheppard the sum of Two Thousand Dollars ($2,000.00) for excess oil produced from the J. H. Sheppard Lease in Upshur County, Texas.

31. That during all of the period alleged in this indictment D. V. Loflin instructed and conversed with one E. K. Bozeman as to the manner and method by which excess oil was to be produced from the A. J. Sanders Lease, Upshur County, Texas.

32. That from on or about January 1, 1936, up to and including on or about May 31, 1936, C. G. Ponder assisted E. K. Bozeman in the production of excess oil from the A. J. Sanders Lease, Upshur County, Texas.

33. That from on or about March 1, 1935, up to and including on or about December 1, 1935, C. G. Ponder instructed L. L. Lane and Archie Brannon as to the manner and method by which excess oil was to be produced from the A. J. Sanders Lease in Upshur County, Texas.

34. That on various dates during March and April of 1935, Eugene P. Williams, under instructions of Ralph Gilliland, paid various sums of money to A. J. Sanders, J. H. Sheppard, and Otto Staerker for excess oil.

35. That during all of the periods mentioned in this indictment David C. McCaleb instructed employees of the Gilliland Refining Company and the Gilliland Pipe Line Company as to the manner and method by which excess oil was to be delivered to the Gilliland Pipe Line Company and the Gilliland Refining Company.

That said unlawful combination, confederation, conspiracy, and agreement, and the acts of the Defendants in pursuance thereof, were contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

11

SECOND COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about April 30, 1935, defendants, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit, knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore,

Texas, the said Department of the Interior, and the said Secretary of the Interior, and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of March 1935 from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg,

Before me, the undersigned authority, on this day personally appeared F. Jones, known to me to be the person whose name is subscribed to this instrument, who, after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and
12 within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) FRANK JONES.

Sworn to and subscribed before me, this 20 day of April 1935.

[SEAL] (S) E. P. WILLIAMS,
Notary Public, Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report, purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of March 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of March 1935, 9,176.4

barrels of oil, when, as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil, were produced during said month of March 1935 from said wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of March 1935 from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about May 31, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, Davis C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, R. G. Trippett, A. H. Meadows, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior, and the said Secretary of the Interior, and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being, each of them, a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of April 1935 from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used and caused to be used the following affidavit and statement:

13

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared Frank Jones known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) FRANK JONES.

Sworn to and subscribed before me, this 15th day of May 1935,
[SEAL] (S) KATHERINE C. BROWN,
Notary Public Gregg County, Texas.

14 which affidavit and statement having then and there been made and caused to be made, and executed and delivered was attached to and formed a part of said Federal Form D, Monthly Producer's Report purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of April 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of April 1935, 9,438 barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of April 1935, from said wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of April 1935, from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FOURTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about June 14, 1935, J. W. Gilliland,

Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Conally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil Inc., purporting to show the amount of petroleum oil produced during the month of May 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said defendants made and caused to be made, used and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared F. Jones known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) F. JONES.

Sworn to and subscribed before me, this 5th day of June 1935.

[SEAL] (S) KATHERINE C. BROWN,
Notary Public Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of May 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as
16 aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of May 1935, 9,654 barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of May 1935, from said wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of May 1935, from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FIFTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about July 10, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Govern-

mental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil Inc., purporting to show the amount of petroleum oil produced during the month of June 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used, and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared F. Jones known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) F. JONES.

Sworn to and subscribed before me, this 3rd day of July, 1935.

[SEAL] (S) MADGE LINDSEY,
Notary Public Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of June 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of June 1935, 9,373, barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of

oil, to wit, more than 15,000 barrels of oil were produced during said month of June 1935, from said wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that
18 said report, affidavit, and statement was false, fra'dulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of June 1935, from said wells located as aforesaid, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

SIXTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about August 8, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil Inc., purporting to show the amount of petroleum oil produced during the month of July 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made
19 and caused to be made, used, and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared Eddie Lawson known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) E. LAWSON.

Sworn to and subscribed before me, this 3rd day of July, 1935.

[SEAL] (S) KATHERINE C. BROWN,
Notary Public, Gregg County, Texas.

which said affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of July 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, willfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of July 1935, 9,448 barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of July 1935, from said wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of July 1935, from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

20 SEVENTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about September 12, 1935, J. W. Gilli-

land, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use, and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to made, use, and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of August 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used, and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared Eddie Lawson, known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent, and that said report contains
no misstatement or inaccuracy within the knowledge of
21 affiant, and that no pertinent matter inquired about in said
report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) EDDIE LAWSON.

Sworn to and subscribed before me, this 5th day of September 1935.

[SEAL] (S) KATHERINE C. BROWN,
Notary Public, Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed, and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report purported to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of August 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, willfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of August 1935, 10,179 barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of August 1935, from said wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of August 1935, from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

EIGHTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about November 18, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George
22 Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use, and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States,

that is to say, said Defendants did then and there make and cause to be made, use, and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of October 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used, and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared Eddie Lawson known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) EDDIE LAWSON.

Sworn to and subscribed before me, this 7th day of November 1935.

(S) BERETH M. PARKINS,
Notary Public Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was
23 attached to and formed a part of said Federal Form D, Monthly Producer's Report, purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of October 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of October 1935, 11,160 barrels of oil, when, as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 16,000 barrels of oil were produced during said month of October 1935, from said wells located upon said A. J.

Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit and statement was false, fraudulent, and fictitious in that they well knew that more than 16,000 barrels of oil were produced during the month of October 1935, from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

NINTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about December 17, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use, and cause to be used a false and fraudulent affidavit knowing the same to
24 contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use, and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil Inc., purporting to show the amount of petroleum oil produced during the month of November 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared Eddie Lawson known to me to be the person whose name

is subscribed to this instrument, who after being by me duly sworn on oath the he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no misstatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) EDDIE LAWSON.

Sworn to and subscribed before me, this 10th day of December 1935.

[SEAL] (S) BERETH M. PARKINS,
Notary Public Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of November 1935, in which said affidavit and statement and report made and caused to
25 be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of November 1935, 10,838 barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of November 1935, from said wells located upon said A. J. Sanders lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of November 1935, from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

26 TENTH COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that on or about April 6, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Capbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert,

Joe Vardeman, J. F. Shepperd, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. G. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form C, Monthly Pipe Line and Storage Report, in the name of the Gilliland Refining Company, for the month of March 1935, of petroleum oil in storage and in pipe line storage, and detailed statement of East Texas crude petroleum oil receipts by runs from various leases and receipts from other gathering and purchasing companies, and attached to and forming a part of said report, the said Defendants made and caused to be made, used and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg:

Before me, the undersigned authority, on this day personally appeared H. O. Radcliffe, known to me to be the person whose name is subscribed to the above instrument, who, being by me duly sworn, on oath states that he made or caused to be made the above report including attached pages two and three, that he has knowledge of all the facts therein, that said report is true and correct, and that no pertinent matter inquired about in said report and within his knowledge has been omitted from said report.

Subscribed and sworn to before me this 6 day of April 1935.

E. P. WILLIAMS,
Notary Public in and for Gregg County, Texas.

27 which said affidavit and statement having then and there been made and caused to be made, and used and caused to be used, and executed and delivered, was attached to and formed a part of said Federal Form C monthly Pipe Line and

Storage Report to the said Federal Tender Board No. 1, Kilgore, Texas, purporting to set out and report to said Federal Tender Board No. 1, Kilgore, Texas, the amounts of Petroleum oil in storage and in pipe line storage and detail of East Texas crude receipts by runs from various leases and receipts from other gathering or purchasing companies during the month of March 1935 by the Gilliland Refining Company, and in which affidavit and statement and report so made the said Defendants wilfully, unlawfully, and feloniously made false, fraudulent, and fictitious statements, namely, that the Gilliland Refining Company had received during the month of March 1935 from the Walker-Harris lease of the Atchafalayou Oil Corporation (sometimes designated as the Atchafalaya Oil Corporation) only 1,111.18 barrels of crude petroleum oil, when as a matter of fact and the true facts then and there being that the said Gilliland Refining Company had received larger amounts of petroleum oil during the month of March 1935 from the said Walker-Harris lease of the said Atchafalayou Oil Corporation, to wit, more than 5,000 barrels of crude petroleum oil; that the Gilliland Refining Company had received during the month of March 1935 from the J. H. Sheppard lease of the Metairie Oil Corporation, alias, Metairie Oil Company, only 489.70 barrels of crude petroleum oil, and that the Gilliland Refining Company had received during the month of March 1935 from the A. J. Sanders lease of the Oil, Inc. only 365.38 barrels of crude petroleum oil, when as a matter of fact and the true facts then and there being that the said Gilliland Refining Company had received larger amounts of crude petroleum oil during the month of March 1935 from the said J. H. Sheppard lease of the said Metairie Oil Corporation and from the said A. J. Sanders lease of the said Oil, Inc., to wit: more than 15,000 barrels of crude petroleum oil from the said J. H. Sheppard lease of the Metairie Oil Corporation and more than 15,000 barrels of crude petroleum oil from the said A. J. Sanders lease of the said Oil, Inc., and the said Defendants did then and there well know that the said report, affidavit, and statement, and the matters set forth in said report, affidavit, and statement were false, fraudulent, and fictitious, in that they well knew that the Gilliland Refining Company had received from the said
28 Walker-Harris lease of the Atchafalayou Oil Corporation and from the said J. H. Sheppard lease of the Metairie Oil Corporation and from the said A. J. Sanders lease of the Oil, Inc. during the month of March 1935 substantially larger amounts of crude petroleum oil, to wit, more than 5,000 barrels from the said Walker-Harris lease of the said Atchafalayou Oil Corporation and more than 15,000 barrels of crude petroleum oil

from the J. H. Sheppard lease of the Metairie Oil Corporation and more than 15,000 barrels of crude petroleum oil from the A. J. Sanders lease of the Oil, Inc., during the month of March 1935.

And at the time and place aforesaid of the making and using of said false, fraudulent, and fictitious affidavit and statement, the said Defendants then and there well knew the same to be false, fraudulent, and fictitious, and contrary to the Form of the Statute in such case made and provided, and against the Peace and Dignity of the United States.

ELEVENTH COUNT

And the Grand Jurors aforesaid, in their oath aforesaid, do further present that on or about May 10, 1935, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, J. H. Campbell, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Fran Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Sheppeard, alias J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H. Meadows, R. C. Trippett, and the Bell General Pipe Line Company, in Gregg County, Texas, in the Tyler Division of the Eastern District of Texas, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there make and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form C, Monthly Pipe Line and Storage Report, in the name of the Gilliland Refining Company, for the month of April 1935, of petroleum oil in storage and in pipe line storage,
29 and detailed statement of East Texas crude petroleum oil receipts by runs from various leases and receipts from other gathering and purchasing companies, and attached to and forming a part of said report, the said Defendants made and caused to be made, used, and caused to be used the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared H. O. Radcliffe, known to me to be the person whose name is subscribed to the above instrument, who, being by me duly sworn, on oath states that he made or caused to be made the above report including attached pages two and three, that he has knowledge of all the facts therein, that said report is true and correct, and that no pertinent matter inquired about in said report and within his knowledge has been omitted from said report.

Subscribed and sworn to before me this 10 day of May 1935.

KATHERINE C. BROWN,
Notary Public in and for Gregg County, Texas.

which said affidavit and statement having then and there been made, and caused to be made, and used and caused to be used, and executed and delivered, was attached to and formed a part of said Federal Form C, Monthly Pipe Line and Storage Report, purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amounts of petroleum oil in storage and in pipe line storage and detail of East Texas crude receipts by runs from various leases and receipts from other gathering or purchasing companies during the month of April 1935, by the Gilliland Refining Company, and in which affidavit and statement and report so made the said Defendants wilfully, unlawfully, and feloniously made false, fraudulent, and fictitious statements, namely, that the Gilliland Refining Company had received during the month of April 1935 from the Walker-Harris Lease of the Atchafalayou Oil Corporation (sometimes designated as the Atchafalaya Oil Corporation) only 3,589.19 barrels of crude petroleum oil, when as a matter of fact and the true facts then and there being that the said Gilliland Refining Company had received larger amounts of petroleum oil during the month of April 1935 from the said Walker-Harris Lease of the Atchafalayou Oil Corporation, to wit: approximately 24,747 barrels of crude petroleum oil; that the Gilliland Refining Company had received during the month of April 1935 from the J. H. Sheppard lease of the Metairie Oil Corporation, alias Metairie Oil Company, no crude petroleum oil, when as a matter of fact and the true facts then and there being that the said Gilliland Refining Company had received large amounts of petroleum oil from the said J. H. Sheppard lease of the said Metairie Oil Corporation, to wit: more than 5,000 barrels; that the Gilliland Refining Company had received

during the month of April 1935 from the A. J. Sanders lease of the Oil, Inc., only 9,397.50 barrels of crude petroleum oil, when as a matter of fact and the true facts then and there being that the said Gilliland Refining Company had received larger amounts of petroleum oil from the said A. J. Sanders lease of the Oil, Inc., to wit: more than 15,000 barrels of crude petroleum oil, and the said Defendants did then and there well know that said report, affidavit, and statements, and the matters set forth in said report, affidavit, and statement were false, fraudulent, and fictitious, in that, the said Defendants well knew that the Gilliland Refining Company had received from the said Walker Harris lease of the Atchafalayou Oil Corporation during the month of April 1935 approximately 24,747 barrels of crude petroleum oil, and that the Gilliland Refining Company had received from the said J. H. Sheppard lease of the Metairie Oil Corporation more than 5,000 barrels of crude petroleum oil during the month of April 1935, and that the Gilliland Refining Company had received from the said A. J. Sanders lease of the Oil, Inc., more than 15,000 barrels of crude petroleum oil during the month of April 1935.

And at the time and place aforesaid of the making and using of said false, fraudulent, and fictitious affidavit and statement, the said Defendants then and there well knew the same to be false, fraudulent, and fictitious, and contrary to the Form of the Statute in such case made and provided, and against the Peace and Dignity of the United States.

(S.) STEVE M. KING,
United States Attorney.

(S.) H. M. BELL,
Foreman of the Grand Jury.

[File endorsement omitted.]

31 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed June 6, 1939

Come now the defendants, J. W. Gilliland, Ralph Gilliland, Fred A. Williams, Eugene P. Williams, David C. McCaleb, D. V. Loflin, W. H. Sparks, H. O. Radcliffe, C. G. Ponder, Frank Jones, Eddie Lawson, L. Tolbert, Joe Vardeman, J. F. Sheppard, O. L. Scarborough, A. M. Pruitt, Vance E. Powell, George Rhodus, Earl Hendrix, W. C. Adams, Fred H. Connally, Harry L. Viser, A. H.

Meadows, R. G. Trippett, and Bell General Pipe Line Company, a corporation, and plead to the indictment herein as follows:

I

The defendants demur generally to each and all of the counts of the indictment for the reason that the facts alleged in the first count fail to show that the defendants conspired to commit any acts that are prohibited by the laws of the United States; and the facts alleged in the ten remaining counts of the indictment fail to show that the defendants committed any acts that are prohibited by the laws of the United States.

32 Wherefore, the defendants pray that the indictment, and each and all of the counts thereof, be dismissed and that they be discharged:

II

Pleading further and especially to the first count of the indictment, the defendants would show that the allegations of the charges are too general, vague, and indefinite to sufficiently charge the offense of conspiracy to commit a crime against the laws of the United States, or to apprise the defendants of the nature of the accusation against them. The charge is as follows:

That the defendants "did heretofore, to wit, continuously from on or about March 1, 1935, up to on or about January 1, 1938, unlawfully, knowingly, fraudulently, wilfully, and feloniously agree, combine, confederate, and conspire among themselves and with each other to commit divers and sundry offenses against the laws of the United States of America, to wit, to knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, false affidavits relating to matters within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, knowing the same to contain fraudulent and fictitious statements, the said Department of the Interior, and the said Secretary of the Interior, and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a governmental department and agency of the United States."

The defendants challenge the sufficiency of the allegations of the charge upon the following grounds:

(1) There are innumerable subjects, or matters, within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board, yet the particular subjects, or matters, which the defendants are accused of having conspired to make and use false affidavits in relation thereto are not set out or described.

33 (2) It is not alleged wherein or in what respect the affidavits were to be false; that is, what the affidavits were to contain, in relation to the subjects, or matters, within the jurisdiction of these governmental departments, that would not conform to the truth.

(3) It is not alleged how, or in what manner, the false affidavits, which the defendants are accused of having conspired to make and use, in relation to subjects or matters within the jurisdiction of these governmental departments, were to be used so that such use would be violative of the laws of the United States.

(4) The purpose and intention of the defendants in making and using the false affidavits, which they are charged with having conspired to make and use, is not averred. It is not even averred that the purpose of the defendants in making and using the false affidavits, which they are accused of having conspired to make and use, was an unlawful or prohibited purpose.

Therefore, because of the vagueness and indefiniteness of the allegations of the charge, as hereinabove pointed out, the defendants are not only ignorant of the nature of the accusation against them, and cannot properly prepare their defense, but the court cannot determine, as a matter of law, whether the evidence that may be offered under the charge will support a conviction if one should be had, because no facts are stated; furthermore, the defendants will be unable to avail themselves of their conviction or acquittal of this accusation as a bar to a subsequent prosecution for the same offense.

III

Pleading further to the first count, the court's attention is directed to a recital of facts following the charge, which purports to describe the acts which the defendants conspired to commit, which recital is denominated "a more definite de-
34 scription of the unlawful agreement and conspiracy to commit said offenses in violation of the laws of the United States." The substance, effect, and import of the facts alleged, insofar as they are relevant to the charge, is this, and nothing more than this:

(1) That the Gilliland Refining Company (who is not a defendant, nor is it charged that it or any of its officers or agents conspired or combined with the defendants in the alleged conspiracy) was to make and file with the Federal Tender Board the reports described in the recital; that Federal Form "D," Monthly Producers Report, would purport to show the production of oil from the A. J. Sanders and J. H. Shepard Leases in Upshur

County and the Walker Harris Lease in Gregg County, Texas, from March 1, 1935, to about June 30, 1936; that Federal Form "C," Monthly Pipe Line and Storage Report, would purport to show the amount of oil received by the pipe lines of the Gilliland Refining Company and Gilliland Pipe Line Company from March 1, 1935, to about October 20, 1936; that Federal Form "A," Refinery and Reclamation Plant Report, would purport to show the amount of oil and products in refinery storage at the first of each month, the amount of oil and products received each month, the amount of such materials consumed in manufacturing operations, the amount of products manufactured therefrom, and the amount of deliveries of all oil and products, from March 1, 1935, to about October 20, 1936.

(2) That the defendants conspired to make and use false affidavits which would relate to and cover these reports.

These facts do not sustain the charge or state any offense. The defendants conspired and agreed, so the facts relate, that they would make and use false affidavits that would relate to and cover the reports which the Gilliland Refining Company was to make and file with the Federal Tender Board. But it is not alleged that these reports were made and had been filed
35 with the Federal Tender Board at the time of the agreement and conspiracy; nor is it alleged that the Gilliland Refining Company ever made or filed any of these reports with the Federal Tender Board. Obviously, these reports could not become subjects of the jurisdiction of these governmental departments until they were made and filed with such departments. It, therefore, follows that the facts averred not only fail to sustain the accusation made in the charge, but wholly fail to state any offense against the United States.

IV

Pleading further to the first count, if it should be held by the court that the recital of facts following the charge is a part of the charge, and the charge, so considered, accuses the defendants of having agreed to make and use false affidavits that would relate to and cover the reports which the Gilliland Refining Company was to make and file with the Federal Tender Board, and that such an agreement is a conspiracy to violate the provisions of section 80, Title 18, U. S. C. A., nevertheless, the facts are not so definitely alleged as to advise the defendants of the charge they have to meet so as to enable them to properly prepare their defense, or so particularly as to enable them to avail themselves of their conviction or acquittal in defense of another prosecution for the same offense, or so clearly that the court may determine, as a mat-

ter of law, whether the facts stated will support a conviction. In this connection, the defendants would show the court the following:

It is alleged that the defendants unlawfully agreed and conspired to make and use false affidavits that would relate to and cover reports designated as (1) Federal Form "D," Monthly Producer's Report, which would purport to show the amount of oil produced from certain leases in Upshur and Gregg Counties, Texas, from about March 1, 1935, up to and including about the 30th day of June 1936; (2) Federal Form "C," Monthly Pipe Line and
36 Storage Report, which would purport to show the amount of oil received by the pipe lines and the amount of oil delivered by the pipe lines of the Gilliland Refining Company and Gilliland Pipe Line Company from about the 1st day of March 1935, up to and including about the 20th day of October 1936; (3) Federal Form "A," Refinery and Reclamation Plant Report, which would purport to show the amount of oil and products in refinery storage at the first of each month, the amount of oil and products received each month, the amount consumed in manufacturing operations, the amount manufactured therefrom, and the amount of the deliveries of all oil and products from about the first day of March 1935, up to and including the 20th day of October 1936; said reports to be made on behalf of the Gilliland Refining Company, Gladewater, Texas.

The defendants challenge the sufficiency of these allegations upon the following grounds:

(1) It is not alleged when the described reports were to be made by the Gilliland Refining Company, or the number of such reports, that is, whether such reports were to be made monthly, or one report upon the described forms at the end of the period stated in the allegations.

(2) It is not alleged when the Gilliland Refining Company was to make such reports and file them with the Federal Tender Board; nor is it alleged that the Gilliland Refining Company ever made any of such reports and filed them with the Federal Tender Board.

(3) It is not alleged when, where, or under what circumstances the defendants were to make such false affidavits, or what statements such affidavits were to contain with reference, or in relation, to such reports that would not conform to the truth.

(4) It is not alleged how, or in what manner, the false affidavits, which the defendants are charged with having conspired to make and use, were to be used, so that such use would constitute a violation of the law; nor is it alleged that the defendants con-
37 spired and intended to use such affidavits in violation of the law.

(5) The purpose and intention of the defendants in making and using the false affidavits, which they are charged with having conspired to make and use, is not averred. It is not even averred that the purpose of the defendants in making and using the false affidavits, which they are accused of having conspired to make and use, was an unlawful or prohibited purpose.

Wherefore, because of the insufficiency of the averments of fact, as hereinabove pointed out, the defendants are not informed of what they will be called upon to meet, and, therefore, cannot properly prepare their defense; and for these reasons the first count of the indictment should be quashed and the defendants discharged.

V

Pleading further, the defendants demur to the second count of the indictment and would show that it is averred that the defendants "did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, a false and fraudulent affidavit, knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior, the said Secretary of the Interior, and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a governmental department and agency of the United States, that is to say, said defendants did then and there make and cause to be made, use and cause to be used, and deliver to the Federal Tender Board No. 1, Kilgore, Texas, a report in writing, designated as Federal Form 'D.' Monthly Producers Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of
38 March 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said defendants made and caused to be made, used and caused to be used, the following affidavit and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared F. Jones, known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn, on oath, that he is the person in charge of superintending the production from all wells on the above property and is employed in the capacity of agent, and that said report contains no misstate-

ment or inaccuracy within the knowledge of the affiant; and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report; and that said report is a correct statement of the facts therein recited.

(Signed) FRANK JONES.

Sworn to and subscribed before me this 20th day of April 1935.

(Signed) E. P. WILLIAMS,
Notary Public, Gregg County, Texas.

which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form 'D,' Monthly Producers Report, purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of March 1935, in which said affidavit and statement and report, made and caused to be made, and used and caused to be used, as aforesaid, the said defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of March 1935, 9,176.4 barrels of oil, when, as a matter of fact, the true facts then and there were that that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of March 1935, from said wells located upon said A. J. Sanders Lease * * *."

39 The defendants challenge this count, because the facts averred are insufficient to constitute an offense, for the following reasons:

(1) The affidavit contains nothing on its face showing any relation to any matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, and Federal Tender Board; and there are no averments, other than the pleaders' conclusions, showing that the statements contained in said affidavit relate to, or the defendants intended them to relate to, any matter within the jurisdiction of said governmental departments or agencies.

(2) There are no averments showing wherein the affidavit is false. It is averred merely that the defendants made and caused to be made a report in writing to the Federal Tender Board, designated as Federal Form "D," Monthly Producers Report; that it was false because it showed a less quantity of oil as having been produced from the A. J. Sanders Lease during the month of March 1935, than was actually produced. It is then averred that the "affidavit and statement, having then and there been

made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form 'D,' Monthly Producers Report." Thus the only information the defendants can glean from the averments as to why the affidavit is false is by inference only; that is, that the affidavit is false because it was attached to a report that was false. But there is nothing in the affidavit itself, as plead, that idenfifies it as being made for the purpose of being attached to and forming a part of the report described in the averments, or as an oath as to the truthfulness of the statements contained in the report; nor is it averred that the defendants, in making and causing said affidavit to be made, intended that it should be attached to and form a part of said report, as an oath to the truthfulness of the statement contained therein. Furthermore, it is not averred who attached the affidavit to the Federal Form "D," Monthly Producers Report, and made it a part of said report.

The alleged false affidavit purports to be an affidavit as to the truthfulness of the statements contained in an instrument signed by Frank Jones; however, there are no averments showing that Frank Jones, at the behest of the defendants, signed the Federal Form "D," Monthly Producers Report, to the Federal Tender Board; nor is it averred who signed said report; neither is the date of said report shown, or any other facts identifying and connecting it with the alleged false affidavit.

Therefore, because of the insufficiency of the averments of this count, as hereinabove pointed out, no offense is stated. In any event, the averments are so general, ambiguous, and indefinite that the defendants are not advised of the nature of the accusation against them and cannot properly prepare their defense upon the issue that the affidavit, which they are charged with having made and caused to be made, contains false and fictitious statements in relation to matters within the jurisdiction of the Department of the Interior, Secretary of the Interior, and Federal Tender Board.

VI

Pleading further to the second count and demurring to the same, the court's attention is directed to the allegations wherein it is averred that in "said affidavit and statement and report, made and caused to be made, and used and caused to be used, as aforesaid, said defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of March 1935, 9,176.4 barrels of oil, when, as a matter of fact, the true facts then and there were that a much greater quantity of oil, to

wit, 15,000 barrels of oil were produced during the month of March 1935, from said wells located on the A. J. Sanders Lease."

41 This averment is wholly inconsistent with and repugnant to all the other averments of the count. The charge is that the defendants "did * * * made and cause to be made, use and cause to be used, a false and fraudulent affidavit, knowing the same to contain false and fictitious statements in relation to a matter within the jurisdiction of the Department of the Interior, Secretary of the Interior, and Federal Tender Board." The affidavit is then set out verbatim. It shows on its face to have been made by the defendant, Frank Jones, but there is nothing contained in its recitals referring to the production of oil from the A. J. Sanders Lease or any other lease.

Therefore, because of the repugnancy and conflict between the various averments of this count, no offense is stated. In any event, the averments are so conflicting, ambiguous, and indefinite that the defendants cannot ascertain therefrom the nature of the accusation against them and cannot properly prepare their defense.

VII

Pleading further to the second count, and demurring to the same, if it should be held by the court that the import and effect of the averments of the second count are to charge the defendants with having made and caused to be made a report to the Federal Tender Board, designated as Federal Form "D", Monthly Producers Report, and that the defendants knowingly and wilfully included in said report false and fictitious statements as to the production of oil from the A. J. Sanders Lease for the month of March 1935, then, in that event, the defendants would show to the court that the averments are still insufficient to state an offense, because:

(1) The report, as plead, contains nothing showing that the statements contained therein had any relation to any matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, or Federal Tender Board, and there are no averments, other than the pleaders' conclusion, showing

42 that the statements contained in said report relates to, or the defendants intended them to relate to, any matter within the jurisdiction of said governmental departments or agencies.

(2) It is not shown by averments that the oil, which was the subject of the report, was a subject of the jurisdiction of the Department of the Interior, Secretary of the Interior, or Federal Tender Board.

(3) It is not shown by averments that the alleged false reports was used or intended to be used by the defendants in connection with the shipment of the oil described in it in interstate commerce; neither is it alleged that the report was made and delivered to the Federal Tender Board as a basis for, or in support of, an application to said board for a certificate of clearance for the shipment of the oil described in the report in interstate commerce.

(4) It is not shown by averments what use the defendants made or intended to make of the report, neither is it averred that the defendants used or intended to use the report to accomplish an unlawful or prohibited purpose.

(5) It is averred that the report was delivered to the Federal Tender Board, but it is not averred that its delivery to said board constituted an unlawful or prohibited use of such report; nor is it disclosed how the mere delivery to the Federal Tender Board of the report constituted a prohibited use of such report.

(6) The purpose and intention of the defendants in making and causing to be made, and using and causing to be used, the alleged false report is not averred; neither is it averred that the defendants made or caused to be made, and used and caused to be used, the alleged false report for an unlawful or prohibited purpose.

VIII

Pleading further to the second count, the defendants would show to the court that there is not a single averment in the
43 entire count from which the defendants can ascertain the theory upon which the pleader bases the accusation of criminality against them, because the purpose and intention of making and causing to be made the alleged false affidavit, and delivering it to the Federal Tender Board, if it can be assumed that the pleader intended to allege that the defendants delivered it to said board, is not shown; nor is the purpose and intention of the defendants in making and causing to be made the alleged false report and delivering it to the Federal Tender Board shown. Therefore, the defendants are left in the dark and cannot prepare themselves to meet what may be shown on the trial to have been their purpose and intention in committing these acts. Will the defendants be met with proof, on the trial, that they made and caused to be made the alleged false affidavit in question relating to matters within the jurisdiction of the Department of the Interior, Secretary of the Interior, and Federal Tender Board, for the purpose of obtaining payment of a false claim against the United States, or a department or officer thereof; or will they be met with proof that they made

and caused to be made a false affidavit or report for the purpose of obtaining a loan of money upon their property from some of the Federal loan agencies, and that the false affidavit and report was made for the purpose of deceiving such agencies and defrauding the United States; or will they be met with proof at the trial that they caused the alleged false affidavit or report to be made to the Federal Tender Board for the purpose of obtaining a certificate of clearance for the transportation in interstate commerce of oil produced in excess of the law of the state? Certainly, it must be shown upon the trial that the defendants committed these acts for some unlawful or prohibited purpose; and just as certainly, the indictment must show that purpose, because the purpose and intention is an element or ingredient of the offense.

44 Therefore, for the reasons hereinabove pointed out, the averments of the second count are so indefinite, uncertain, ambiguous, and repugnant that they fail to state an offense. In any event, the defendants cannot ascertain therefrom the nature of the accusation against them, so that they can properly prepare their defense; consequently, said count should be quashed and the defendants discharged from the acousation of the same.

IX

Pleading further and demurring to the third, fourth, fifth, sixth, seventh, eighth, and ninth counts of the indictment, the defendants would show that the averments in each of said counts are identical with the averments contained in the second count, with the exception that the defendant, Eddie Lawson, signed the affidavits set out in the sixth, seventh, eighth, and ninth counts, and the further exception that each count covers a different month during the year 1935. Otherwise, as above stated, the averments of these counts are identical with the averments of the second count. Therefore, the defendants demur to and challenge the sufficiency of all of these counts upon the same grounds and objections urged against the sufficiency of the second count, to the same extent as if such objections were made separately to each count; and by reason of the insufficiency of the averments of fact in the third, fourth, fifth, sixth, seventh, eighth, and ninth counts of the indictment, no offense is stated. In any event, the averments of these counts, and each of them, are so general, indefinite, ambiguous, and repugnant that the defendants cannot ascertain therefrom the nature of the several accusations against them, and, consequently, they cannot properly prepare their defense. Therefore, each and all of said counts should be quashed and the defendants discharged.

X

Pleading further and demurring to the tenth count, the defendants would show that it is averred that they "did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, a false and fraudulent affidavit, knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, * * * that is to say, said defendants did then and there make and cause to be made, use and cause to be used, and delivered to said Federal Tender Board No. 1, Kilgore, Texas, a report in writing, designated as Federal Form "C," Monthly Pipe Line and Storage Report, in the name of the Gilliland Refining Company, for the month of March 1935, of petroleum oil in storage and in pipe line storage, and detailed statement of East Texas crude petroleum oil receipts by runs from various leases and receipts from other gathering and purchasing companies, and, attached to and forming a part of said report, said defendants made and caused to be made, used and caused to be used, the following affidavits and statement:

STATE OF TEXAS,
County of Gregg.

Before me, the undersigned authority, on this day personally appeared H. O. Radcliffe, known to me to be the person whose name is subscribed to the above instrument, who, being by me duly sworn on oath states that he made or caused to be made the above report, including attached pages 2 and 3; that he has knowledge of all the facts therein, that said report is true and correct and that no pertinent matter inquired about in said report and within his knowledge has been omitted from said report.

Subscribed and sworn to before me, this 6th day of April, 1935.

(Signed) E. P. WILLIAMS,
Notary Public in and for Gregg County, Texas.

which said affidavit and statement, having then and there been made and caused to be made,[1] and used and caused to be used, *and executed and delivered,*[1] was attached to and formed a part of said Federal Form "C," Monthly Pipe Line and Storage Report to the said Federal Tender Board No. 1, Kilgore, Texas, purporting to set out and report to said Federal Tender Board No. 1, Kilgore, Texas, the amount of petroleum oil in storage and in pipe line storage, and detail of East Texas crude

[1] Italics ours

46 receipts by runs of various leases and receipts from other gathering and purchasing companies during the month of March 1935, by the Gilliland Refining Company, and in which affidavit and statement and report so made the said defendants wilfully, unlawfully, and feloniously made false, fraudulent, and fictitious statements, namely * * *." It is then averred that the report was false in that it showed less quantities of oil to have been received by the Gilliland Refining Company from certain leases in Gregg County, Texas, during the month of March 1935, than was actually received.

The defendants challenge this count because the facts averred are insufficient to constitute an offense, for the following reasons:

(1) The alleged false affidavit, as plead, does not show that it was signed or executed by any of the defendants. In fact, it does not purport to be an affidavit, but a certificate of E. P. Williams, a notary public, purporting to show that H. O. Radcliffe, known to him, had subscribed his name to an instrument, which had attached to it pages 2 and 3, and denominated by the notary as a report; but the kind and character of report, and to whom made, it not shown in the certificate. The certificate shows that Radcliffe swore that he had knowledge of all of the facts contained in the instrument and that it was true and correct, and that no pertinent matter inquired about in the report and within Radcliffe's knowledge had been omitted from the report. However, there is nothing in the certificate of the notary which identifies the oath taken by Radcliffe as being an oath as to the correctness of the Federal Form "C," Monthly Pipe Line and Storage Report to the Federal Tender Board, described in the preceding averments; nor are there any averments that Radcliffe, at the behest of the defendants, subscribed his name to the report to the Federal Tender Board and that they then caused him to appear before Williams, the notary public,

47 and make the oath as to its correctness, as shown by the certificate of Williams, so as to connect and identify the alleged false affidavit plead with the alleged report to the Federal Tender Board. On the contrary, it is averred that the defendants made and caused to be made the report to the Federal Tender Board. Therefore, the recitals of the certificate of the notary public, as plead, which is denominated by the pleader as an affidavit, are so conflicting and repugnant to the preceding averments of this count that the defendants cannot ascertain the nature of the accusation against them, and, consequently, cannot properly prepare their defense.

(2) The purported affidavit contains nothing on its face showing any relation to any matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, and

Federal Tender Board; and there are no averments, other than the pleader's conclusions, showing that the statements contained in said affidavit relate to, or the defendants intended them to relate to, any matter within the jurisdiction of said governmental departments or agencies.

(3) There are no averments showing wherein the purported affidavit is false. It is averred merely that the defendants made and caused to be made a report in writing to the Federal Tender Board, designated as Federal Form "C," Monthly Pipe Line and Storage Report; that it was false because it showed a less quantity of oil as having been received by the Gilliland Refining Company during the month of March 1935, than was actually received. It is then averred that the "affidavit and statement, having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form 'C,' Monthly Pipe Line and Storage Report." Thus the only information the defendants can glean from the averments as to why the purported affidavit is false, is by inference only; that is, that the purported affidavit is false because it was attached to a report that was false. But there is nothing in the purported affidavit, as plead, that identifies it as being made for the
48 purpose of being attached to and forming a part of the report described in the averments, or as an oath as to the truthfulness of the statements contained in said report; nor is it averred that the defendants, in making and causing said purported affidavit to be made, intended that it should be attached to and form a part of said report, as an oath to the truthfulness of the statements contained therein. Furthermore, it is not averred to whom the purported affidavit was delivered; nor is it averred who attached the purported affidavit to the Federal Form "C," Monthly Pipe Line and Storage Report, and made it a part of said report.

Therefore, because of the insufficiency of the averments of this count, as hereinabove pointed out, no offense is stated. In any event, the averments are so general, ambiguous, and indefinite that the defendants are not advised of the nature of the accusation against them and cannot properly prepare their defense upon the issue that the affidavit, which they are charged with having made and caused to be made, contains false and fictitious statements in relation to matters within the jurisdiction of the Department of the Interior, Secretary of the Interior, and Federal Tender Board.

XI

Pleading further to the tenth count, and demurring to the same, the court's attention is directed to the allegations wherein

it is averred: "in which affidavit and statement and report, so made, the said defendants wilfully, unlawfully, and feloniously made false, fraudulent, and fictitious statements, namely, that the Gilliland Refining Company had received, during the month of March 1935, from the Walker Harris Lease," etc. This averment is wholly inconsistent with and repugnant to all the other averments of the count. The charge is that the defendants "did * * * make and cause to be made, use, and cause to be used, a false and fraudulent affidavit knowing the same to contain false and fictitious statements in relation to a matter within the jurisdiction of the Department of the Interior, Secre-
49 tary of the Interior, and Federal Tender Board." The purported false affidavit is then set out verbatim, which, as we have seen, is nothing but a certificate of E. P. Williams, a notary public, that he had administered an oath to H. O. Radcliffe as to the execution of an instrument, and there is nothing in the recitals contained in the certificate that makes any reference to receipts of oil by the Gilliland Refining Company from the Walker Harris Lease, or any of the other leases mentioned in the averments.

Therefore, because of the repugnancy of the claims of the various averments of this count, no offense is stated. In any event, the averments are so conflicting, ambiguous, and indefinite that the defendants cannot ascertain therefrom the nature of the accusation against them and cannot properly prepare their defense.

XII

Pleading further to the tenth count, and demurring to the same, if it should be held by the court that the import and effect of the averments of the tenth count are to charge the defendants with having made and caused to be made a report to the Federal Tender Board, designated as Federal Form "C", Monthly Pipe Line and Storage Report, and that the defendants knowingly and wilfully included in said report false and fictitious statements as to the receipts of oil from the Walker Harris and other named leases for the month of March 1935 then, in that event, the defendants would show to the court that the averments are still insufficient to state an offense, because:

(1) The report, as plead, contains nothing showing that the statements contained therein had any relation to any matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, or Federal Tender Board, and there are no averments, other than the pleaders' conclusion, showing that the statements contained in said report relate to, or the defendants intended them to relate to, any matter within the jurisdiction of said governmental departments or agencies.

50 (2) It is not shown by averments that the oil, which was the subject of the report, was a subject of the jurisdiction of the Department of the Interior, Secretary of the Interior, or Federal Tender Board.

(3) It is not shown by averments that the alleged false report was used or intended to be used by the defendants in connection with the shipment of the oil described in it in interstate commerce; neither is it alleged that the report was made and delivered to the Federal Tender Board as a basis for, or in support of, an application to said board for a certificate of clearance for the shipment of the oil described in the report in interstate commerce.

(4) It is now shown by averments what use the defendants made or intended to make of the report, neither is it averred that the defendants used or intended to use the report to accomplish an unlawful or prohibited purpose.

(5) It is averred that the report was delivered to the Federal Tender Board, but it is not averred that its delivery to said board constituted an unlawful or prohibited use of such report; nor is it disclosed how the mere delivery to the Federal Tender Board of the report constituted a prohibited use of such report.

(6) The purpose and intention of the defendants in making and causing to be made, and using and causing to be used, the alleged false report is not averred; neither is it averred that the defendants made or caused to be made, and used and caused to be used, the alleged false report for an unlawful or prohibited purpose.

Therefore, for the reasons hereinabove pointed out, the averments of the tenth count are so indefinite, uncertain, ambiguous, and repugnant that they fail to state an offense. In any event, the defendants cannot ascertain therefrom the nature of the accusation against them, so that they can properly prepare their defense; consequently, said count should be quashed and the defendants discharged from the accusation of the same.

51 XIII

Pleading further, and demurring to the eleventh count, the defendants would show that the averments in said count are identical with the averments contained in the tenth count, with the exception that its averments cover the month of April 1935. Otherwise the averments of the tenth and eleventh counts are identical.

Therefore, the defendants demur to and challenge the sufficiency of the eleventh count upon the same grounds and objections urged against the sufficiency of the tenth count, to the same extent as if such objections were made separately to the eleventh count; and, by reason of the insufficiency of the averments of

fact in the eleventh count, no offense is stated. In any event, the averments of the eleventh count are so general, indefinite, ambiguous, and repugnant that the defendants cannot ascertain therefrom the nature of the accusation against them, and, consequently, they cannot properly prepare their defense. Therefore, the eleventh count should be quashed and the defendants discharged from the accusations of the same.

(Signed) F. W. FISCHER,
F. W. Fischer,
Tyler, Texas,
Attorney for Defendants.

[File endorsement omitted.]

52 In United States District Court for the Eastern District of Texas, Tyler Division

Criminal No. 4394

UNITED STATES OF AMERICA
vs.
J. W. GILLILAND, ET AL.

For Plaintiff: Messrs. Steve M. King, United States Attorney for the Eastern District of Texas. O. John Rogge, Assistant Attorney General, Welly K. Hopkins, Special Assistant to the Attorney General. Walter E. Gallagher, Special Assistant to the Attorney General. Ben F. Foster, Special Assistant to the Attorney General.

For Defendants: Mr. F. W. Fischer, Attorney At Law, Tyler, Texas.

Opinion

Filed Feb. 20, 1940

DAWKINS, J.: The indictment in this case consists of eleven counts. The first charges a conspiracy, as the Government contends, to violate Section 80 (a) of Tit. 18 of the U. S. Code (Section 35 of the Criminal Code), as amended by the Act of June 18, 1934, as well as the Act of February 22, 1935, known as the Connally Hot Oil Act. The remaining ten counts cover substantive offenses sought to be laid under Section 80 (a) of Tit. 18 of the Code.

Defendants have filed a lengthy demurrer, attacking the indictment on numerous grounds, which may be summarized under the following headings:

53 (1) That the facts alleged in all counts do not charge offenses against the United States;

(2) All counts are too vague and indefinite to enable defendants to plead thereto; and

(3) In any event, the facts alleged in counts two to eleven, inclusive, are insufficient to bring them within the perview of Section 80 (a) of Tit. 18, U. S. C.

Pertinent portions of the bill are quoted as follows:

"* * * Defendants, did heretofore, to-wit, continuously from on or about March 1, 1935, up to or about January 1, 1938, unlawfully, knowingly, fraudulently, wilful'y, and feloniously agree, combine, confederate, and conspire among themselves and with each other, to commit divers and sundry offenses against the laws of the United States of America, to-wit, to knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, false affidavits relating to matters within the jurisdiction of the Department of the Interior and the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, knowing the same to contain fraudulent and fictitious statements, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being, each of them, a Government Department and Agency of the United States.

"The Grand Jurors further present that a more definite description of the unlawful agreement and conspiracy to commit said offenses in violation of the laws of the United States, is as follows:

"That certain of the said Defendants would produce and cause to be produced oil from certain leases hereinafter described, situated in Gregg and Upshur Counties, Texas, and within jurisdiction of this Court, which oil would be produced in violation of the laws of Texas, and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells of said leases. Certain others of the said Defendants were to, without lawful authority and without approved tenders or permits of the Railroad Commission of Texas or the Federal Tender Board, No. 1, Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg County, Texas, or cause the same to be done, and certain others of said Defendants were to refine the said unlawfully produced oil so transported, and manufacture it into contraband products at the said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of the said Defendants were to sell, ship, and deliver into interstate commerce, the said contraband products so manufactured and cause the same to be done, without
53 lawful authority and in violation of the laws of the United States.

"That said Defendants would make and cause to be made, use and cause to be used false and fraudulent affidavits in, and relating to, matters within the jurisdiction of said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, knowing that said affidavits would contain fraudulent and fictitious statements, and which false affidavits would relate to and cover reports designated as (1) Federal Form D, Monthly Producer's Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and which would purport to show the amount of petroleum oil produced from the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, the Walker-Harris Lease, Martha Dillard Survey, Gregg County, Texas, and the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas, from on or about the 1st day of March 1935, up to and including about the 30th day of June 1936; (2) Federal Form C, Monthly Pipe Line and Storage Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and which would purport to show the amount of petroleum oil received by the pipe lines and the amount of oil delivered by the pipe lines of the Gilliland Refining Company and the Gilliland Pipe Line Company, from on or about the 1st day of March 1935, up to and including about the 20th day of October 1936; (3) Federal Form A, Refinery and Reclamation Plant Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and would purport to show the amount of petroleum oil and products thereof in refinery storage at the 1st of each month, and would purport to show the amount of petroleum oil and products received each month, the amount of such materials consumed in manufacturing operations, the amount of products manufactured therefrom, and the amount of deliveries of all oil and products, said reports to be made on behalf of the Gilliland Refining Company, Gladewater, Texas, from on or about the 1st day of March 1935, up to and including about the 20th day of October 1936."

Some thirty-five overt acts are charged, none of which need be considered at this time.

The substantive counts (two to eleven) are similar, and number two, is quoted for purposes of illustration:

"* * * on or about April 30, 1935 (Defendants)

* * * * * * * * *

did knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use, and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and

55 the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there made and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of March 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used and caused to be used the following affidavit and statement:

"STATE OF TEXAS,
County of Gregg.

"Before me, the undersigned authority, on this day personally appeared F. Jones, known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no mis'tatement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(S) FRANK JONES.

"Sworn to and subscribed before me, this 20 day of April 1935.

[SEAL] (S) E. P. WILLIAMS,
Notary Public, Gregg County, Texas.

"which affidavit and statement having then and there been made and caused to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report, so purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil, produced from said wells during the month of March 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of March 1935, 9,176.4

barrels of oil, when, as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more
56 than 15,000 barrels of oil were produced during said month of March 1935 from said wells located on said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they well knew that more than 15,000 barrels of oil were produced during the month of March 1935 from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

Of course, the first count is laid under Section 88, Tit. 18 of the Code (Section 37 of the Criminal Code), denouncing conspiracies. To show conspiracy, the facts charged must bring the act or acts to be committed within the provisions of some other criminal statute. The Government insists that the allegations of the present bill are encompassed by both said Section 80 (a) and the Connally Act. Section 80 (a) Tit. 18, of the U. S. Code reads:

"Whoever shall make or cause to be made or present, or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder; knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." [Italics by the author of the present opinion.]

Pertinent provisions of the Connally Act are as follows:

"SECTION 715b. Interstate Transportation of Contraband Oil Forbidden.

"'The shipment or transportation in interstate commerce from any State of contraband oil produced in such State is hereby

prohibited. For the purposes of this section contraband oil shall not be deemed to have been produced in a State if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or
57 withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State. * * *'

"'SECTION 715d. Rules and Regulations; Certificates of Clearance; Issuance by Boards; Review of Denial of Certificate by Board. (a) The President shall prescribe such regulations as he finds necessary or appropriate for the enforcement of the provisions of this chapter, including but not limited to regulations requiring reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products, and providing for the keeping of books and records, and for the inspection of such books and records and of properties and facilities.

"'SECTION 715e. Penalties for Violation of Chapter. Any person knowingly violating any provision of this chapter or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment.' * * *"

The applicable regulation under this Act provides:

"'Each producer, refiner, reclamation plant, casinghead gasoline plant, pipe line, and storer of petroleum or petroleum products in any designated area shall file with the Board for said area monthly reports on forms approved by the Secretary of the Interior. Each report on such forms shall be subscribed and sworn to by the person required to file the same, using the form of affidavit therein contained, and the person required to file the report must make therein a full, truthful, and complete disclosure of all the information required on the form and necessary to the full use thereof.'"

Reduced to simple language, the issues, as I see them, are, does Section 80 (a), Tit. 18 of the Code apply to the facts charged in this indictment; and if not, does the first count charge a conspiracy under the Connally Act?

Section 35 of the Criminal Code, of which Section 80 (a) forms a part, originated as the Act of March 2, 1863 (12 Stat. 696) and later became Section 5438 of the Revised Statutes, under the codification of December 1st, 1873, approved June 22, 1874. Up to that time it carried a single penalty as to all offenses "of not

less than one nor more than five Years" at hard labor "or" a fine of "not less than $1,000 nor more than $5,000." An
58 amendment of May 30, 1908 (35 Stat. 555), along with other minor changes, separated the offenses, and provided as to some penalties of "not more than five years" imprisonment (at hard labor), "or" a fine of "not more than $5,000" with no minimum; and as to others, evidently considered as of lesser consequence, "not more than two years" imprisonment "and" a fine "not exceeding $500." The Act of March 4, 1909 (35 Stat. 1088), entitled an "Act to Codify, Revise, and Amend the Penal Laws of the United States," declared that "they are hereby codified, revised, and amended, with title, chapters, headings, and sections, entitled and numbered and to read as follows": "Chapter Four" was headed "Offenses Against the Operations of the Government," and, beginning with Section 27 running through Section 84, the subject matter of each section was listed by a short description, and former Section 5438 of the Revised Statutes (the one involved here), received the number "35, Making or presenting false claims." The only changes made in this section were to add the words "or both" (imprisonment or fine) at the end of the first clause which provided greater penalties, the substitution of a period for the semicolon formerly used, and the transposition of the provisions for fine in each instance to precede the terms of imprisonment, but the conjunction "and" was retained between the fine and imprisonment of the lesser class of offenses.

Unsuccessful attempts having been made under Section 35 to punish persons committing frauds against some of the corporations created by Congress during the World War, in which the Government owned all or a part of the stock (Sallas v. U. S., 234 Fed. (C. C. A.) 842; U. S. vs. Bowman, 260 U. S. 92) Congress passed the amendment of October 23, 1918 (40 Stat. 1015), which made this Section applicable to "any corporation in which the United States of America is a stockholder." The Act of April 4, 1938, merely divided Section 35 into Subsections (A), (B), and (C), and separated them into paragraphs.

Up to this point, it cannot be doubted that the purpose of Section 35 of the Criminal Code was to reach "offenses against the operations of the Government," by punishing those "making or presenting false claims" against it. Therefore, this case must turn upon the effect of the amendment of June 18, 1934 (48 Stat. 996). For convenience, Subsection (a) is again quoted with the controverted clause emphasized as follows:

"SEC. 35. (a) Whoever shall make or cause to be made or pre nt or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation

in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to such person having authority to receive the same any amount of such money or other property less than for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." [Italics by the author of the present author of the present opinion.]

59 It is contended by the Government that this language added by the amendment of June 18, 1934, emphasized in the quotation, has broadened it to include affidavits, reports, vouchers, etc., in connection with any matter over which any Department of the Government or its agencies has jurisdiction, whether they have any relation to claims or frauds in the "operations of the Government" or not. If correct, of course, this would embrace any false affidavits or reports about oil produced in violation of

the state laws since administration of the Connally Act has been committed to the Interior Department. On the other hand, defendants insist that both the history of Section 35, as above recited, and the rules of strict construction which must be applied to criminal statutes require that the amendment of 1934 shall be confined to such acts when committed in connection with operations of the Government as such; and, further, that the Connally Act was intended to cover the entire field or subject matter of excluding hot oil from Interstate Commerce with the consequent repeal of all other provisions dealing with it. The Government points to a report of the Senate Judiciary Committee of May 28, 1934, when this amendment was being considered as supporting its contention. That report is as follows:

"The Bill amends section 35 of the Criminal Code so as to provide penalties for wilful injuries to or depredations against any property of the United States, any of its branches or departments, or any corporation in which the United States is a stockholder, and any property which is in the course of manufacture or construction for the War or Navy Departments.

"*The first two committee amendments were proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid. The third amendment is a clarifying amendment to remove an apparent ambiguity in the House bill.*" [Italics by the author of the present opinion.]

60 Of course, where there is ambiguity or uncertainty, such reports may be resorted to in construing a statute, particularly to save it from unconstitutionality, but they cannot serve to overturn well-established principles of interpretation. Granting that the Interior Department desired and thought it could make the harsh penalties of this section of the Criminal Code applicable to its administration of the Connally Act, that purpose could not be accomplished except by the use of proper legislative methods. While it is true that everyone is presumed to know the law, still it must be in such form that a reasonable person reading it can understand what is denounced and the penalty to be expected. Can it be fairly said that anyone, examining the provisions of both the Connally Act and Section 80 (a), would understand that, in addition to the comparatively light penalties imposed by the former for its violation, if he made a false affidavit or report with respect to matters covered by its provisions, he could be imprisoned for ten years and fined $10,000; whereas, if he transported a million barrels

of hot oil in interstate commerce without making such affidavit or report, he could be imprisoned not more than six months or fined not more than $2,000? In other words, that a single step of this particular nature would subject him to punishment twenty times as great as the completed act which the law was intended to prevent? It would seem that before such an astounding conclusion is reached the purpose of Congress to make it possible should be clearly established. Under the well known doctrine of ejusdem generis, general or omnibus clauses, such as "in any matters within the jurisdiction of any department or agency," would mean matters of a similar or kindred nature to those dealt with in the explicit provisions of the law, in this instance, such as claims against, rights to, or controversies about funds or property involved in "operations of the Government." To hold with the prosecution in this case would be to say that Congress intended to create a multitude of crimes with respect to operations of the innumerable and ever
61. growing departments, bureaus, and agencies of the Government by the simple means of amending in general terms a statute which had always been understood to apply to matters in which the Government was financially interested.

In U. S. vs. Kitell, 211 U. S. 370, the Supreme Court had under consideration an indictment consisting of two counts, the first of which charged a conspiracy to illegally obtain title to coal lands belonging to the United States, in violation of Section 5440 of the Revised Statutes; and a second count charging a conspiracy to violate Section 4746 by "making and presenting and causing to be made and presented, in connection with the entries of coal land, certain false, forged, and fictitious affidavits and papers." The court called attention to the fact that the last mentioned section had been one bearing the title of "Pensions" and that the amendment of July 7, 1898, had added thereto a clause that "anyone who made or assisted in making false affidavits, etc., concerning any claim for pension * * * or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or the Secretary of the Interior" should be punished as provided therein. As stated, the second count of the indictment was laid under this section 4746 as thus amended and charged the making of false and fictitious papers, in connection with coal lands of the Government, which were under the jurisdiction of the Secretary of the Interior. The lower court had quashed both counts of the indictment, the first of which has no bearing upon the present case, and in disposing of the appeal of the Government with respect to the second count, the court, through Justice White, later Chief Justice, at page 395, had this to say:

"It was conceded by the United States in argument, and indeed it could not have been in reason denied, that the section in question, as originally embodied under the head of pensions in the Revised Statutes, related exclusively to pension or bounty claims. No crime, therefore, could have been predicated under the original section upon the affidavits or other papers used in
62 making the coal land entries as alleged in the indictment.

The contention, therefore, as now made by the United States, to sustain the second count, rests upon the proposition that the amendment to #4746 by the act of July 7, 1898, had the effect of bringing within that section subjects to which, prior to the amendment, the section in no manner related. Turning to the text, which we have previously quoted, with the provisions incorporated by the amending a[illegible] printed therein in italics, it will be observed that every enu[illegible]on or description of new acts or papers, in addition to those [illegible]aced in the section prior to the amendment, alone concern pension or bounty land claims. The argument as to the broad scope of the statute in its present form rests therefore alone upon the proposition that because the amendatory statute in repeating the original words, viz, 'concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions,' adds to them the following, viz, 'or of the Secretary of the Interior,' therefore the statute now embraces not only acts done in connection with pension or bounty land claims but all acts of prohibited character as to any matter coming before the Secretary of the Interior, or subject to so come, entirely without reference to whether they were in pension or bounty land claims or proceedings. But to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes, wholly disconnected with claims for pensions or bounty land, with which latter it was alone evidently the purpose of the original as well as the amendatory statute to deal. We think to state the proposition is in effect to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of the amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the Commissioner of Pensions. In other words, that the only purpose of the amendment was to more fully deal with the subjects with which the provision which was amended dealt,

and not by way of the amendment to legislate concerning every conceivable subject coming within the jurisdiction of the Secretary of the Interior. To otherwise hold would not only violate the most elementary rules of construction, but would require the treating as superfluous the new words of enumeration concerning pension matters which the amendatory act expressed. This follows because if the adding by way of amendment of the words

'or of the Secretary of the Interior' contemplated bringing
63 within the criminal inhibitions of the statute every act of a like nature to those forbidden done in connection with every subject within the jurisdiction of the Secretary of the Interior, then the new enumerations made in the amendment were wholly unnecessary, because without enumeration they would have been embraced in the statute as amended. Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of a mere amendment to the section of the statutes which was alone concerned with pension and bounty land claims. Construing the statute as relating only to the subject of pension and bounty land claims coming within the authority of the Commissioner of Pensions of the Secretary of the Interior, it follows that a violation of its provisions could not arise from the acts charged in the indictment concerning the coal land entries." See also U. S. vs. Salen, 235 U. S. 237.

It is my belief that the principle involved in the present case is closely parallel to that applied in those just cited.

Counsel for the Government have cited a number of cases as supporting its contention that Section 80 (a) can be made to apply to the present indictment. A few of them will be analyzed to demonstrate what is believed to be the lack of application. In Mellon vs. U. S., 96 Fed. (2d) 462, the very language quoted by counsel shows that Mellon and his associates were charged with a conspiracy to commit the offense of "obtaining a modernization loan of $575" under the provisions of Tit. 1, Section 2, of the National Housing Administration Act (Tit. 12, Section 1703 U. S. C.). "which application and loan were matters within the jurisdiction of the Federal Housing Administration, an agency of the United States." Plainly, the well understood object of Section 35 of the Criminal Code to protect the Government against frauds heretofore discussed, was involved.

The case of Hammerschmidt vs. U. S., 265 U. S. 182, also cited, I think, supports the conclusion reached in the present case. Counsel quote an excerpt therefrom to the effect that "* * * it is not necessary that the Government shall be subjected to

64 Pecuniary loss * * *." This is true of any indictment for conspiracy, that is, it does not have to be charged as having succeeded, but the commission of any overt act in furtherance thereof is sufficient. Hammerschmidt was charged, with others, with conspiracy "to defraud the United States by impeding, obstructing and defeating a lawful function of its Government * * *," to wit, the execution of the Selective Service Act of May 18, 1917 (Chap. 15, 40 Stat. 76). Chief Justice Taft stated that the indictment was based upon certain language of Justice Lurton in Haas v. Henkel, 216 U. S. 462, to the effect that "if two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the conspiracy, all the parties to such conspiracy shall be liable," etc. In sustaining the position of the defendants that the Selective Service Act could not properly be brought within the reach of such a charge, Justice Taft, at page 187, said:

"It is obvious that the writer of the opinion and the Court were not considering whether deceit or trickery was essential to satisfy the defrauding required under the statute. The facts in the case were such that that question was not presented. The deceit of the public, the trickery in the advance publication secured by bribery of an official, and the falsification of the report, made the fraud and deceit so clear as the gist of the offenses actually charged that their presence was not in dispute. The sole question was whether the fraud there practised must have inflicted upon the Government pecuniary loss, or whether its purpose and effect to defeat a lawful function of the Government and injure others thereby was enough. That was all that Mr. Justice Lurton's words can be construed to mean. The cases in which this case has been referred to involved unquestioned deceit or false pretense, and it was only cited in them to the point that financial loss of the Government is not necessary to violate the section. United States v. Foster, 233 U. S. 515, 526; United States v. Barnow, 239 U. S. 74, 79. See also United States v. Plyler 222, U. S. 15, in respect to #5418, Rev. Stats.

"To conspire to defraud the United States means to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dis-

65 honest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention. It is true that the works 'to defraud' as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or

overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods amoung frauds. In Horman v. United States, 116 Fed. 350, #5480, Rev. Stats., as amended March 2, 1889, c. 393, 25 Stat. 873, making it a crime to devise any scheme or artifice to defraud by use of the mails and opening correspondence with any person, and to mail a letter in execution thereof, was held to be violated by the sending of a letter threatening to blacken the character of another unless that other paid the blackmailer money. It was held that the word 'scheme' in that section was of broader meaning and did not necessarily involve trickery or cunning in the scheme, if use of the mails was part of it; that intent to defraud in such a statute was satisfied by the wrongful purpose of injuring one in his property rights. The question had much consideration. The decision, however, went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. Section 5480 has since been again amended to make its scope clearer. Its construction in the Horman Case can not be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it."

I think the language thus quoted also effectively disposed of Haas v. Henkel, supra, cited by the Government in the present case.

Counsel for the Government have also cited the case of Claude E. Spivey vs. U. S., No. 9038, in which the opinion was handed down by the Court of Appeals for this Circuit on January 15, 1940. There the indictment charged offenses under Section 80 (1), 83 (2), and 338 of Tit. 18 of the U. S. C. A. It involved use of the mails to defraud, the "making of false and fictitious statements in violation of Section 80" and a "conspiracy to defraud the Government by obtaining payment or allowance of false or fraudulent claims." The facts charged were summarized by the Court as follows:

66½

"Defendants, owners of a cotton gin and warehouse, in pursuance of a scheme, by false pretenses and practices to obtain moneys from and through the Commodity Credit Corporation, in which the United States of America was a stockholder and which was an agency of the United States, would induce farmers bringing their cotton to be ginned, to sign in blank, notes and loan agreements, commonly known as Commodity Credit Corporation cotton producer's notes. The notes and agreements so signed would be padded, that is, filled out for sums in excess of the amounts actually obtained by the farmers thereon, and with bales of cotton, which the signers thereof had not raised

or claimed; in some instances the names of makers of the notes would be forged. Thereupon defendant would take the notes to divers and sundry banks and secure credit thereon, and the banks, believing the notes were genuine, would assign them to the Commodity Credit Corporation.

"The charge in the eighteen counts under Section 80, was that the notes and cotton agreements aforesaid, would be fraudulently and fictitiously prepared and altered, so as to show thereon, sums of money and bales of cotton in excess of the amounts obtained and bales owned by the purported signers of the notes. Count twenty, charged that the things done by the defendants were and amounted to, an agreement or conspiracy to defraud the Government by obtaining or aiding to obtain, the payment or allowance of false or fraudulent claims."

From the second paragraph of the quotation it can readily be seen that in so far as Section 80 of Tit. 18 of the Code was concerned, the charge covered false, forged, and fictitious papers, seeking to fraudulently obtain money from the Government. Counsel have referred to the following language as supporting their contention:

"The points made as to the convictions under Section 80 are no better taken. The language of the section is plain and completely comprehensive, and that it was intended to, and does apply to situations of the kind in question here, is equally plain. For, it stands admitted, not only that the Commodity Credit Corporation is an agency of the United States, and that the matters in question were the lending of money on
67 farmer's notes, which come within the scope of its agency, but that the United States, though the stock is nominally held by officials of the Government, is the owner and beneficial holder of all of its stock. This being so, the fact that the stock is not in the name of the United States is immaterial. *The force and effect of statutes of this kind, designed to prevent frauds upon the Government my not be frittered away by a mere literal construction.* Read as a whole, it is perfectly plain, we think, that the statute includes the Commodity Credit Corporation, a creation of the Government, which its stock by the statutes of its creation, standing in the name of officials of the United States. Equally untenable is appellee's argument that the Section must be held to be limited to claims against, and as not extending to, negotiations with, the Government. While Criminal Statutes, may not by process of construction, be extended beyond their natural and reasonable meaning, neither may they be, by the same process, deprived of their natural meaning. The statute makes it an offense to 'falsify or cover up, by any trick, scheme, or device, a material fact, or make or

cause to be made, any false or fraudulent statements * * * in any matter within the jurisdiction of any department or agency, etc.' *The facts disclosed falsification, tricks, schemes, and devices in matters within the jurisdiction of the Commodity Credit Corporation, the Corporation covered by the Act. The fact that the Act in other portions deals with claims against the Government, does not, in any manner take from its force when dealing with other matters than claims.*" [Italics supplied.]

They relied particularly upon the last two sentences just quoted. However, the decision shows plainly that it was dealing with the facts alleged as hereinabove quoted, involving a scheme to defraud the Government, and I think its import must be restricted accordingly. In any event, I do not consider the case authority for the contention of the Government in the present one.

Notwithstanding, I have concluded that Section 35 of the Criminal Code does not apply, yet I am of the opinion that the first count of the indictment sufficiently charges a conspiracy to violate the Connally Act. It can make no difference that the allegations of fact were also intended to show an unlawful undertaking to commit offenses under Section 35 of the Criminal Code. The
68 following is quoted from the indictment to demonstrate that the conspiracy was also laid under the Connally Act.

"* * * produce and cause to be produced oil from certain leases hereinafter described, situated in Gregg and Upshur Counties, Texas, and within the jurisdiction of this Court, which oil would be produced in violation of the laws of Texas, and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases. Certain others of the said defendants were to, without lawful authority and without approved tenders or permits of the Railroad Commission of Texas or the Federal Tender Board No. 1 of Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg County, Texas, or cause the same to be done, and certain others of said defendants were to refine the said unlawfully produced oil so transported, and manufacture it into contraband products at the said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of the said defendants were to sell, ship, and deliver into interstate commerce the said contraband products so manufactured and cause the same to be done without lawful authority and in violation of the laws of the United States."

This, I believe, is sufficient. See Short vs. U. S., 91 Fed. (2d) 969; Capone vs. U. S., 51 Fed. (2d) 609.

Without finding it necessary to discuss the contentions of the defendants in regard to the insufficiency of the allegations of the

conspiracy, I think it suffices to say that all of the information needed is given to enable the defendants to plead thereto.

My conclusion is that the demurrer should therefore be overruled as to count one and sustained as to the remaining ten counts of the indictment.

Thus read, done, and signed at Chambers on this the 19th day of February 1940.

(Signed) BEN C. DAWKINS,
United States District Judge
for the Western District of Louisiana.

[File endorsement omitted.]

69 In United States District Court

[Title omitted.]

Motion for rehearing

Filed March 7, 1940

Now comes the United States of America by its attorneys and with leave of the Court first had and obtained, respectfully moves the Court:

I

That no judgment be entered on the opinion filed herein on February 20, 1940.

II

That the opinion filed herein on February 20, 1940, be withdrawn and the Government be permitted to reargue the demurrers, filed on behalf of defendants, and to present additional authorities in support of the indictment and the applicability of Section 80, Title 18, U. S. C. A., to the facts set out in said indictment.

III

That upon rehearing of argument and presentation of additional authorities in support of the indictment and the applicability of Section 80, Title 18, U. S. C. A., to the facts set out in said indictment, the Court enter an order overruling defendants' demurrers in all particulars and hold them for trial.

(Signed) BEN F. FOSTER,
(Signed) GEORGE RED,
Attorneys for United States of America,
Also Special Assistants to the Attorney General.

70 I, Ben F. Foster, Special Assistant to the Attorney General, do certify that a true and correct copy of the foregoing motion has been served upon F. W. Fischer, counsel of record for defendants in the above entitled and numbered cause, by transmitting a true and correct copy of the same to the said F. W. Fischer by means of a registered letter, properly stamped, and deposited in the United States mails, at Houston, Texas, on the 6th day of March A. D. 1940, addressed to the said F. W. Fischer at Tyler, Texas.

(Signed) BEN F. FOSTER,
Special Assistant to the Attorney General.

[File endorsement omitted.]

71 In United States District Court

[Title omitted.]

Motion for rehearing

Filed March 9, 1940

Now come the defendants named in the indictment herein, by and through their attorney, and would respectfully show to the court that they believe the court has fallen into error in the construction of a portion of the averments contained in the first count of the indictment herein, wherein the court concluded, as shown in his opinion filed herein on February 20th, 1940, that the averments of the first count are sufficient to charge the defendants with the offense of having conspired to violate sec. 715, Title 15, U. S. C. A., commonly known as the Connally Act, for the following reasons, to wit:

I

The averments of the first count fail to show a common intent and agreement by the defendants to ship or transport into interstate commerce, from the State of Texas, contraband oil, as that term is defined by said Act of Congress.

72 II

The acts, which the defendants agreed to commit, as shown by the averments of the first count, do not constitute a violation of sec. 715, Title 15, U. S. C. A., known as the Connally Act; therefore no offense is stated, as the object of the conspiracy, assuming that the averments sufficiently show a common intent and agreement to commit such acts.

Wherefore, defendants respectfully pray that upon the hearing hereof, that the court enter a decree sustaining the demurrer of the defendants to the indictment herein in its entirety.

Respectfully submitted.

F. W. FISCHER,
Tyler, Texas,
Attorney for Defendants.

[File endorsement omitted.]

73 In United States District Court for the Eastern District of Texas, Tyler Division

Criminal No. 4394

UNITED STATES OF AMERICA
vs.
J. W. GILLILAND ET AL.

Judgment sustaining demurrer

Filed May 16, 1940

For the reasons assigned in the written opinion heretofore handed down in this case, it is ordered, adjudged, and decreed that the demurrer of the defendants to Counts 2 to 11, both inclusive, be, and the same are hereby sustained and the Counts are dismissed.

To which ruling the Government excepts and a bill of exception is allowed.

Done and signed in Monroe, Louisiana, on this the 15th day of May 1940.

(Signed) BEN C. DAWKINS,
United States District Judge for the Western District of Louisiana, sitting as Judge in the Eastern District of Texas.

[File endorsement omitted.]

74 In United States District Court

[Title omitted.]

Stipulation re exceptions

Filed June 12, 1940

It is stipulated that upon the court passing upon the respective motions for rehearing of the government and the defendants both

counsel for the government and counsel for the defendants excepted to the action of the Court in overruling their respective motions, but the Court inadvertently overlooked noting the defendants' exceptions to the Court's judgment in the decree entered herein.

(S) STEVE M. KING,
United States Attorney for the Eastern District of Texas.
(S) BEN F. FOSTER,
Special Assistant to the Attorney General.
(S) F. W. FISCHER,
Attorney for the Defendants.

[File endorsement omitted.]

75 In United States District Court

[Title omitted.]

Petition for appeal

Filed June 11, 1940

Comes now the United States of America, plaintiff herein, and states that on the 15th day of May 1940 the District Court of the United States for the Eastern District of Texas sustained a demurrer to counts two to eleven, both inclusive, of the indictment herein, and the United States of America, feeling aggrieved at the ruling of said District Court in sustaining said demurrer, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
STEVE M. KING,
United States Attorney for the Eastern District of Texas.
BEN F. FOSTER,
Special Assistant to the Attorney General.

[File endorsement omitted.]

107 In United States District Court

[Title omitted.]

Assignments of error

Filed June 11, 1940

Comes now the United States of America by Steve M. King, United States Attorney for the Eastern District of Texas, and by Ben F. Foster, Special Assistant to the Attorney General, and avers that in the record proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the court erred in sustaining as to counts two to eleven, inclusive, the demurrer to the indictment.

2. That the court erred in holding that the portion of Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 (U. S. C., Title 18, Sec. 80), upon which counts two to eleven of the indictment were predicated, applies only to matters in which the Government is financially interested.

3. That the court erred in holding that under the doctrine of ejusdem generis the words "in any matter within the jurisdiction of any department or agency of the United States," as contained in Section 35 of the Criminal Code as amended, are confined to such matters as claims against, rights to, or controversies
108 about funds or property involved in "operations of the Government."

4. That the court erred in holding that the addition of the words "in any matter within the jurisdiction of any department or agency of the Un ited States" to the pertinent portion of Section 35 of the Criminal Code by the 1934 amendment did not broaden the scope and application thereof.

5. That the court erred in disregarding the deletion from the applicable portion of Section 35 of the Criminal Code by the 1934 amendment of restrictive language which had limited its application to false statements, affidavits, etc., in connection with matters involving money or property of the Government.

6. That the court erred in disregarding the Report of the Senate Judiciary Committee to the effect that a purpose of the amendments to the pertinent portion of Section 35 of the Criminal Code,

which were subsequently incorporated by the 1934 Act, was to reach a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith.

STEVE M. KING,
United States Attorney for the Eastern District of Texas.
BEN F. FOSTER,
Special Assistant to the Attorney General.

[File endorsement omitted.]

109 In United States District Court

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed June 12, 1940

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment in this cause sustaining a demurrer by the defendants to counts two to eleven, inclusive, of the indictment in said cause, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered such petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court, Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court in sustaining the demurrer of the defendants to the indictment, to the Supreme Court of the United States and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

110 It is further Ordered that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Lake Charles, La., this 12th day of June 1940.

By the Court:

(S) BEN C. DAWKINS,
United States District Judge.

[File endorsement omitted.]

112 [Citation in usual form showing service on F. W. Fischer, filed June 12, 1940, omitted in printing.]

114 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed June 12, 1940

To the Clerk, United States District Court for the Eastern District of Texas:

The appellant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the Eastern District of Texas, in connection with its appeal to the Supreme Court of the United States, you include the following:

1. Indictment.
2. Demurrer.
3. Opinion.
4. Government's motion for rehearing.
4a. Defendants' motion for rehearing.
5. Order upon rehearing.
6. Judgment sustaining demurrer.
6a. Stipulation.
7. Petition for appeal to the Supreme Court.
8. Statement of jurisdiction of Supreme Court.
9. Assignments of error.
10. Order allowing appeal.
11. Notice of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement as to jurisdiction.

115 12. Citation.
13. Praecipe.

STEVE M. KING,
United States Attorney for the Eastern District of Texas.

BEN F. FOSTER,
Special Assistant to the Attorney General.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 12th day of June 1940.

(Sd.) F. W. FISCHER,
Counsel for Appellees.

[File endorsement omitted.]

116 [Clerk's certificate to foregoing transcript omitted in printing.]

117 In Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed July 23, 1940

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

FRANCIS BIDDLE,
Solicitor General.

1940.

Service of the above Statement of Points and Designation of Record acknowledged this 18 day of July 1940.

F. W. FISCHER,
Counsel for Appellees.

[File endorsement omitted.]

[Endorsement on cover:] File No. 44594. E. Texas, D. C. U. S. Term No. 245. The United States of America, Appellant, vs. J. W. Gilliland, Ralph Gilliland, Fred A. Williams, et al. Filed July 15, 1940. Term No. 245 O. t. 1940.

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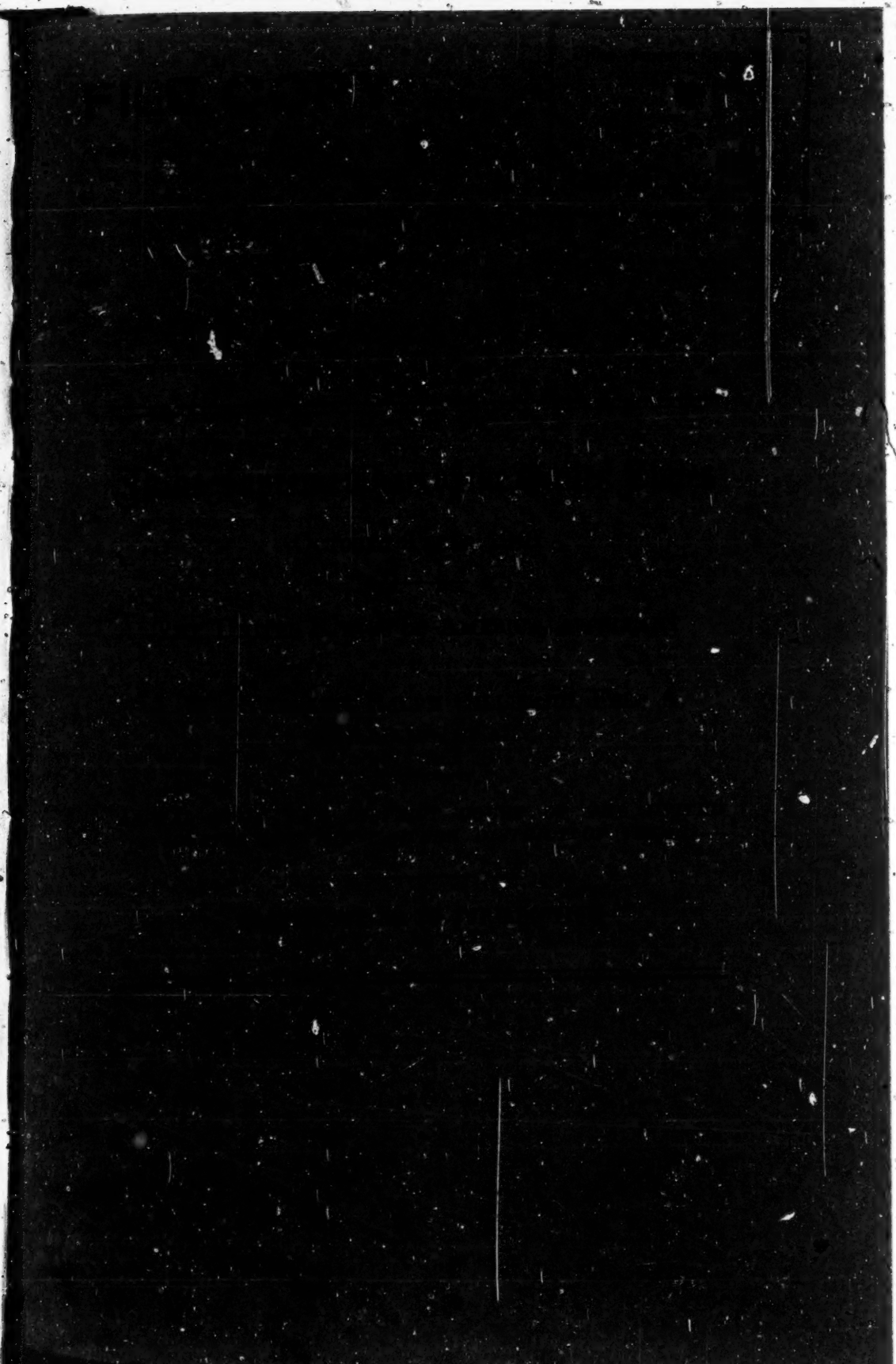

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In the District Court of the United States for the Eastern District of Texas

Crim. No. 4394

UNITED STATES OF AMERICA, PLAINTIFF

v.

J. W. GILLILAND ET AL., DEFENDANTS

STATEMENT OF JURISDICTION

(Filed June 12, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by United States Code, Title 18, Section 682, otherwise known as the "Criminal Appeals Act," and by United States Code, Title 28, Section 345.

B. The statute of the United States, the construction of which is involved herein, is the following portion of Section 35 of the Criminal Code as

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amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 (U. S. C., Title 18, Sec. 80):

> * * * or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

C. The judgment of the District Court sought to be reviewed was entered on May 15, 1940, and the petition for appeal was filed June 11, 1940, and is presented to the District Court herewith, to wit, on the 12th day of June 1940.

The indictment in this case contains eleven counts. The first count is not, however, involved since the District Court overruled the demurrer to that count. Counts two to eleven, inclusive, are based upon that portion of Section 35 of the Criminal Code, as amended, which is quoted *supra*. Each of the counts states that on a certain day the defendants did knowingly make and cause to be made, use and cause to be used a false and fraudulent affidavit in a matter within the jurisdiction

of the Department of the Interior, the Secretary thereof, and the Federal Tender Board No. 1, Kilgore, Texas, created pursuant to the Connally "Hot Oil" Act, the affidavit being a part of a report purporting to show the amount of petroleum oil produced from certain wells during a particular month.

While the District Court, in sustaining the demurrer, conceded that the words of the statute "in any matter within the jurisdiction of any department or agency of the United States," would embrace, if the Government's position were accepted, "any false affidavits or reports about oil produced in violation of the state laws since administration of the Connally Act has been committed to the Interior Department," it held that under the doctrine of *ejusdem generis* these words must be confined to "matters of a similar or kindred nature to those dealt with in the explicit provisions of the law * * *, such as claims against, rights to, or controversies about funds or property involved in 'operations of the Government.'" And it added that "To hold with the prosecution in this case, would be to say that Congress intended to create a multitude of crimes with respect to operations of the innumerable and ever-growing departments, bureaus, and agencies of the Government by the simple means of amending in general terms a statute which had always been understood to apply to matters in which the Government was financially interested."

This decision was called to the attention of the

Supreme Court of the United States by the Government in its brief in opposition (pp. 13–14) to the petition for writ of certiorari in *Goldsmith* v. *United States*, No. 729, last term, which petition sought review of a decision of the Circuit Court of Appeals for the Second Circuit (108 F. (2d) 917) holding that since the amendment of June 18, 1934, to Section 35 of the Criminal Code, the element of possible pecuniary or property loss to the Government was no longer an essential ingredient of the offense denounced by that portion of the statute upon which the present indictment was predicated.[1] In its brief the Government pointed out that the opinion in the instant case ignored the fact that Congress, by the amendment of 1934, deleted the restrictive language in the statute which had limited its applications to false statements, etc., in connection with matters involving money or property of the Government. The Government also referred to the refusal of the District Court in the present case to give any weight to the legislative history of the 1934 amendment, as disclosed through the Report of the Senate Judiciary Committee,[2] upon the asserted ground that no ambi-

[1] In the *Goldsmith* case the petitioner was charged with procuring false certificates to be used by aliens in applying to consuls for immigration visas.

[2] This report disclosed that one of the purposes of the amendment was to reach a large number of cases involving the shipment of "hot oil" where false papers are presented in connection therewith (Government's Brief in Opposition, pp. 9–10).

guity or uncertainty existed in the statute, while at the same time resorting to the doctrine of *ejusdem generis*, which, of course, is equally inapplicable if there is no ambiguity or uncertainty. Certiorari was refused in the *Goldsmith* case on March 25, 1940, and a petition for rehearing denied May 20, 1940.

In the hope of persuading the District Court to reverse its holding in the instant case, and thus obviate a direct appeal to the Supreme Court of the United States, the Government, upon a reargument of the demurrer, stressed the decision of the Circuit Court of Appeals for the Second Circuit in the *Goldsmith* case and the denial by the Supreme Court of certiorari in that case, but the District Court declined to vacate its decision.

The decision of the District Court is contrary not only to the decision of the Circuit Court of Appeals for the Second Circuit in the *Goldsmith* case but also the prior decisions of that court in *United States* v. *Mellon*, 96 F. (2d) 462, certiorari denied, 304 U. S. 586, and *United States* v. *Presser*, 99 F. (2d) 819, 922. See also *United States* v. *Crittenden*, 24 F. Supp. 84, 87 (W. D. N. Y.). Cf. *Spivey* v. *United States*, 109 F. (2d) 181, 185 (C. C. A. 5th).

D. The following decisions sustain the jurisdiction of the Supreme Court under that provision of the Criminal Appeals Act allowing a direct appeal to the Supreme Court "From a decision or judgment * * * sustaining a demurrer to any in-

dictment, or any count thereof, where such decision or judgment is based upon the * * * construction of the statute upon which the indictment is founded":

United States v. *Patten,* 226 U. S. 525, 535.

United States v. *Birdsall,* 233 U. S. 223, 230.

United States v. *Kapp,* 302 U. S. 214, 217.

United States v. *Borden Co.*, 308 U. S. 188, 192–193.

It may also be suggested that the jurisdiction of the Supreme Court may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, when the defendants have not been put in jeopardy. See: *United States* v. *Celestine,* 215 U. S. 278; *United States* v. *Barber,* 219 U. S. 72; *United States* v. *Oppenheimer,* 242 U. S. 85; *United States* v. *Thompson,* 251 U. S. 407; *United States* v. *Goldman,* 277 U. S. 229.

Appended hereto is a copy of the opinion of the District Court rendered on February 20, 1940.

Respectfuly submitted.

(sd.) FRANCIS BIDDLE,
Solicitor General.

(sd.) STEVE M. KING,
United States Attorney for the Eastern District of Texas.

BEN F. FOSTER,
Special Assistant to the Attorney General.

Filed June 12, 1940. Lee Simmons, Clerk, U. S. Court. By Susie Kerr, Deputy.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

Criminal No. 4394

UNITED STATES OF AMERICA

vs.

J. W. GILLILAND ET AL.

DAWKINS, *J.*:

The indictment in this case consists of eleven counts. The first charges a conspiracy, as the Government contends, to violate Section 80 (a) of Tit. 18 of the U. S. Code (Section 35 of the Criminal Code), as amended by the Act of June 18, 1934, as well as the Act of February [illegible], 1935, known as the Connally Hot Oil Act. The remaining ten counts cover substantive offenses sought to be laid under Section 80 (a) of Tit. 18 of the Code.

Defendants have filed a lengthy demurrer, attacking the indictment on numerous grounds, which may be summarized under the following headings:

(1) That the facts alleged in all counts do not charge offenses against the United States;

(2) All counts are too vague and indefinite to enable defendants to plead thereto; and

(3) In any event, the facts alleged in counts two to eleven, inclusive, are insufficient to bring them

within the purview of Section 80 (a) of Tit. 18, U. S. C.

Pertinent portions of the bill are quoted as follows:

> * * * Defendants, did heretofore, to wit, continuously from on or about March 1, 1935, up to on or about January 1, 1938, unlawfully, knowingly, fraudulently, wilfully, and feloniously agree, combine, confederate, and conspire among themselves and with each other, to commit divers and sundry offenses against the laws of the United States of America, to wit, to knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, false affidavits relating to matters within the jurisdiction of the Department of the Interior and the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, knowing the same to contain fraudulent and fictitious statements, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being, each of them, a Governmental Department and Agency of the United States.
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> The Grand Jurors further present that a more definite description of the unlawful agreement and conspiracy to commit said offenses in violation of the laws of the United States, is as follows:
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> That certain of the said Defendants would produce and cause to be produced oil from certain leases hereinafter described, situated in Gregg and Upshur Counties, Texas, and within jurisdiction of this Court, which oil would be produced in violation of the laws of Texas, and the rules and regulations

of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases. Certain others of the said Defendants were to, without lawful authority and without approval tenders or permits of the Railroad Commission of Texas or the Federal Tender Board, No. 1, Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg County, Texas, or cause the same to be done, and certain others of said Defendants were to refine the said unlawfully produced oil so transported, and manufacture it into contraband products at the said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of the said Defendants were to sell, ship, and deliver into interstate commerce, the said contraband products so manufactured and cause the same to be done, without lawful authority and in violation of the laws of the United States. That said Defendants would make and cause to be made, use and cause to be used false and fraudulent affidavits in, and relating to, matters within the jurisdiction of said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board, No. 1, Kilgore, Texas, knowing that said affidavits would contain fraudulent and fictitious statements, and which false affidavits would relate to and cover reports designated as (1) Federal Form D, Monthly Producer's Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and which would purport to show the amount of petroleum oil produced from the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, the Walker-

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Harris Lease, Martha Dillard Survey, Gregg County, Texas, and the J. H. Sheppard Lease, T. Allen Survey, Upshur County, Texas, from on or about the 1st day of March, 1935, up to and including about the 30th day of June, 1936; (2) Federal Form G, Monthly Pipe Line and Storage Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and which would purport to show the amount of petroleum oil received by the pipe lines and the amount of oil delivered by the pipe lines of the Gilliland Refining Company and the Gilliland Pipe Line Company, from on or about the 1st day of March, 1935, up to and including about the 20th day of October, 1936; (3) Federal Form A, Refinery and Reclamation Plant Reports to be filed with said Federal Tender Board No. 1, Kilgore, Texas, and would purport to show the amount of petroleum oil and products thereof in refinery storage at the 1st of each month, and would purport to show the amount of petroleum oil and products received each month, the amount of such materials consumed in manufacturing operations, the amount of products manufactured therefrom, and the amount of deliveries of all oil and products, said reports to be made on behalf of the Gilliland Refining Company, Gladewater, Texas, from on or about the 1st day of March, 1935, up to and including about the 20th day of October, 1936.

Some thirty-five overt acts are charged, none of which need be considered at this time.

The substantive counts (two to eleven) are similar, and number two is quoted for purposes of illustration:

> * * * on or about April 30, 1935 (Defendants) * * * did knowingly, wil-

fully, unlawfully, and feloniously make and cause to be made, use and cause to be used a false and fraudulent affidavit knowing the same to contain false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas, the said Department of the Interior and the said Secretary of the Interior and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a Governmental Department and Agency of the United States, that is to say, said Defendants did then and there made and cause to be made, use and cause to be used, and deliver to the said Federal Tender Board No. 1, Kilgore, Texas, a report in writing designated as Federal Form D, Monthly Producer's Report of the United States Department of the Interior, petroleum Administration, in the name of Oil Inc., purporting to show the amount of petroleum oil produced during the month of March 1935, from the oil wells located on the A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and attached to and forming a part of said report, said Defendants made and caused to be made, used and caused to be used the following affidavit and statement:

"State of Texas,

County of Gregg.

"Before me, the undersigned authority, on this day personally appeared F. Jones known to me to be the person whose name is subscribed to this instrument, who after being by me duly sworn on oath that he is the person in charge of superintending the production from all wells on the above property, and is employed in the capacity of Agent and that said report contains no mis-

statement or inaccuracy within the knowledge of affiant, and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report, and that said report is a correct statement of the facts therein recited.

(s) FRANK JONES.

"Sworn to and subscribed before me, this 20 day of April 1935.

[SEAL] (s) E. P. WILLIAMS,
Notary Public Gregg County, Texas."

which affidavit and statement having then and there been made and cause to be made, and executed and delivered, was attached to and formed a part of said Federal Form D, Monthly Producer's Report purporting to set forth and report to the said Federal Tender Board No. 1, Kilgore, Texas, the amount of oil produced from said wells during the month of March 1935, in which said affidavit and statement and report made and caused to be made, and used and caused to be used, as aforesaid, the said Defendants knowingly, wilfully, unlawfully, and feloniously made false and fraudulent statements, namely, that there were produced from the wells located upon said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, during the month of March 1935, 9,176.4 barrels of oil, when as a matter of fact, the true facts then and there were that a much greater quantity of oil, to wit, more than 15,000 barrels of oil were produced during said month of March 1935 from said wells located on said A. J. Sanders Lease, T. Allen Survey, Upshur County, Texas, and the said Defendants did then and there well know that said report, affidavit, and statement was false, fraudulent, and fictitious in that they

well knew that more than 15,000 barrels of oil were produced during the month of March 1935 from said wells located as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Of course, the first count is laid under Section 88, Tit. 18 of the Code (Section 37 of the Criminal Code) denouncing conspiracies. To show conspiracy, the fact charged must bring the act or acts to be committed within the provisions of some other criminal statute. The Government insists that the allegations of the present bill are encompassed by both said section 80 (a) and the Connally Act. Section 80 (a), Tit. 18, of the U. S. Code reads:

> Whoever shall make or cause to be made or present, or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or

deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Emphasis by the author of the present opinion.)

Pertinent provisions of the Connally Act are as follows:

SECTION 715b. INTERSTATE TRANSPORTATION OF CONTRABAND OIL FORBIDDEN.

The shipment or transportation in interstate Commerce from any State of contraband oil produced in such State is hereby prohibited. For the purposes of this section contraband oil shall not be deemed to have been produced in a State if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State. (* * *.)

SECTION 715d. RULES AND REGULATIONS; CERTIFICATES OF CLEARANCE; ISSUANCE BY BOARDS; REVIEW OF DENIAL OF CERTIFICATE BY BOARD.

(a) The President shall prescribe such regulations as he finds necessary or appropriate for the enforcement of the provisions of this chapter, including but not limited to regulations requiring reports, maps, affidavits, and other documents relating to the production, storage, refining, processing,

transporting, or handling of petroleum and petroleum products, and providing for the keeping of books and records, and for the inspection of such books and records and of properties and facilities.

SECTION 715e. PENALTIES FOR VIOLATION OF CHAPTER.

Any person knowingly violating any provision of this chapter or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment. (* * *.)

The applicable regulation under this act provides:

Each producer, refiner, reclamation plant, casinghead gasoline plant, pipe line, and storer of petroleum or petroleum products in any designated area shall file with the Board for said area monthly reports on forms approved by the Secretary of the Interior. Each report on such forms shall be subscribed and sworn to by the person required to file the same, using the form of affidavit therein contained, and the person required to file the report must make therein a full, truthful and complete disclosure of all the information required on the form and necessary to the full use thereof.

Reduced to simple language, the issues, as I see them, are, does Section 80 (a), Tit. 18 of the Code apply to the facts charged in this indictment; and if not, does the first count charge a conspiracy under the Connally Act?

Section 35 of the Criminal Code, of which Section 80 (a) forms a part, originated as the Act of

March 2, 1863 (12 Stat. 696) and later became Section 5438 of the Revised Statutes under the codification of December 1st, 1873, approved June 22, 1874. Up to that time it carried a single penalty as to all offenses "of not less than one nor more than five years" at hard labor "or" a fine of "not less than $1,000 nor more than $5,000." An amendment of May 30, 1908 (35 Stat. 555), along with other minor changes, separated the offenses, and provided as to some penalties of "not more than five years" imprisonment (at hard labor), "or" a fine of not more than $5,000," with no minimum and as to others, evidently considered as of lesser consequence, "not more than two years" imprisonment "and" a fine "not exceeding $500." The Act of March 4, 1909 (35 Stat. 1088), entitled an "Act to Codify, Revise, and Amend the Penal Laws of the United States," declared that "they are hereby codified, revised, and amended, with title, chapters, headings, and sections, entitled and numbered and to read as follows:" "Chapter Four" was headed "Offenses Against the Operations of the Government," and, beginning with Section 27 running through Section 84, the subject matter of each section was listed by a short description, and former Section 5438 of the Revised Statutes (the one involved here) received the number "35," "Making or presenting false claims." The only changes made in this section were to add the words "or both" (imprisonment or fine) at the end of the first clause which provided greater penalties, the sub-

stitution of a period for the semicolon formerly used, and the transposition of the provisions for fine in each instance to precede the terms of imprisonment, but the conjunction "and" was retained between the fine and imprisonment of the lesser class of offenses.

Unsuccessful attempts having been made under Section 35 to punish persons committing frauds against some of the corporations created by Congress during the World War, in which the Government owned all or a part of the stock (*Sallas* v. *U. S.*, 234 Fed. (C. C. A.) 842; *U. S.* v. *Bowman*, 260 U. S. 92) Congress passed the amendment of October 23, 1918 (40 Stat. 1015), which made this Section applicable to "any corporation in which the United States of America is a stockholder." The Act of April 4, 1938, merely divided Section 35 into subsections (A), (B), and (C), and separated them into paragraphs.

Up to this point, it cannot be doubted that the purpose of Section 35 of the Criminal Code was to reach "offenses against the operations of the Government," by punishing those "making or presenting false claims" against it. Therefore, this case must turn upon the effect of the amendment of June 18, 1934 (Stat. 996). For convenience, Subsection (A) is again quoted with the controverted clause emphasized as follows:

> SEC. 35. (A) Whoever shall make or cause to be made or present or cause to be pre-

sented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to

> be delivered to such person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. [Emphasis by the author of the present opinion.]

It is contended by the Government that this language added by the amendment of June 18, 1934, emphasized in the quotation, has broadened it to include affidavits, reports, vouchers, etc., in connection with any matter over which any Department of the Government or its agencies has jurisdiction, whether they have any relation to claims or frauds in the "operations of the Government" or not. If correct, of course, this would embrace any false affidavits or reports about oil produced in violation of the state laws since administration of the Connally Act has been committed to the Interior Department. On the other hand, defendants insist that both the history of Section 35, as above recited, and the rules of strict construction which must be applied to criminal statutes require that the amend-

ment of 1934 shall be confined to such acts when committed as such in connection with operations of the Government; and, further, that the Connally Act was intended to cover the entire field or subject matter of excluding hot oil from Interstate Commerce with the consequent repeal of all other provisions dealing with it. The Government points to a report of the Senate Judiciary Committee of May 28, 1934, when this amendment was being considered as supporting its contention. That report is as follows:

> The Bill amends section 35 of the Criminal Code so as to provide penalties for wilful injuries to or depredations against any property of the United States, any of its branches or departments, or any corporation in which the United States is a stockholder, and any property which is in the course of manufacture or construction for the War or Navy Department.
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> *The first two committee amendments were proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of "hot" oil. Where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid. The third amendment is a clarifying amendment to remove an apparent ambiguity in the House bill.* [Emphasis by the author of the present opinion.]

Of course, where there is ambiguity or uncertainty, such reports may be resorted to in construing a statute, particularly to save it from unconstitutionality, but they cannot serve to overturn well-established principles of interpretation. Granting that the Interior Department desired and thought it could make the harsh penalties of this section of the Criminal Code applicable to its administration of the Connally Act, that purpose could not be accomplished except by the use of proper legislative methods. While it is true that everyone is presumed to know the law, still it must be in such form that a reasonable person reading it can understand what is denounced and the penalty to be expected. Can it be fairly said that anyone, examining the provisions of both the Connally Act and Section 80 (a), would understand that, in addition to the comparatively light penalties imposed by the former for its violation, if he made a false affidavit or report with respect to matters covered by its provisions, he could be imprisoned for ten years and fined $10,000; whereas, if he transported a million barrels of hot oil in interstate commerce, without making such affidavit or report, he could be imprisoned not more than six months or fined not more than $2,000? In other words, that a single step of this particular nature would subject him to punishment twenty times as great as the completed act which the law was intended to prevent? It would seem that before such an astounding conclusion is reached, the purpose of Congress to

make it possible should be clearly established. Under the well-known doctrine of ejusdem generis, general or omnibus clauses, such as "in any matters within the jurisdiction of any department or agency," would mean matters of a similar or kindred nature to those dealt with in the explicit provisions of the law, in this instance, such as claims against, rights to or controversies about funds or property involved in "operations of the Government." To hold with the prosecution in this case, would be to say that Congress intended to create a multitude of crimes with respect to operations of the innumerable and ever-growing departments, bureaus, and agencies of the Government by the simple means of amending in general terms a statute which had always been understood to apply to matters in which the Government was financially interested.

In *U. S.* vs. *Kitell*, 211 U. S. 370, the Supreme Court had under consideration an indictment consisting of two counts, the first of which charged a conspiracy to illegally obtain title to coal lands belonging to the United States, in violation of Section 5440 of the Revised Statutes; and a second count charging a conspiracy to violate Section 4746 by "making and presenting and causing to be made and presented, in connection with the entries of coal land, certain false, forged, and fictitious affidavits and papers." The court called attention to the fact that the last-mentioned section had been one bearing the title of "pensions" and that the

amendment of July 7, 1898 had added thereto a clause that "anyone who made or assisted in making false affidavits, etc., concerning any claim for pension * * * or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or the Secretary of the Interior" should be punished as provided therein. As stated, the second count of the indictment was laid under this section 4746 as thus amended and charged the making of false and fictitious papers, in connection with coal lands of the Government, which were under the jurisdiction of the Secretary of the Interior. The lower court had quashed both counts of the indictment, the first of which has no bearing upon the present case, and in disposing of the appeal of the Government with respect to the second count, the court, through Justice White, later Chief Justice, at page 395, had this to say:

> It was conceded by the United States in argument, and indeed it could not have been in reason denied, that the section in question, as originally embodied under the head of pensions in the Revised Statutes, related exclusively to pension or bounty claims. No crime, therefore, could have been predicated under the original section upon the affidavits or other papers used in making the coal-land entries as alleged in the indictments. The contention, therefore, as now made by the United States, to sustain the second count, rests upon the proposition that the amendment to #4746 by the act of July 7, 1898, had the effect of bringing within that section subjects to which, prior to the amendment the section in no manner

related. Turning to the text, which we have previously quoted, with the provisions incorporated by the amending act, printed therein in italics, it will be observed that every enumeration or description of new acts or papers in addition to those embraced in the section prior to the amendment, alone concern pension or bounty land claims. The argument as to the broad scope of the statute in its present form rests therefore alone upon the proposition that because the amendatory statute in repeating the original words, viz., "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," adds to them the following, viz., "or of the Secretary of the Interior," therefore the statute now embraces not only acts done in connection with pension or bounty land claims, but all acts of prohibited character as to any matter coming before the Secretary of the Interior, or subject to so come, entirely without reference to whether they were in pension or bounty land claims or proceedings. But to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes, wholly disconnected with claims for pensions or bounty land, with which latter it was alone evidently the purpose of the original as well as the amendatory statute to deal. We think to state the proposition is in effect to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of the amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the statute in respect to such

papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the Commissioner of Pensions. In other words, that the only purpose of the amendment was to more fully deal with the subjects with which the provision which was amended dealt, and not by way of the amendment to legislate concerning every conceivable subject coming within the jurisdiction of the Secretary of the Interior. To otherwise hold would not only violate the most elementary rules of construction, but would require the treating as superfluous the new words of enumeration concerning pension matters which the amendatory act expressed. This follows, because if the adding by way of amendment of the words "or of the Secretary of the Interior" contemplated bringing within the criminal inhibitions of the statute every act of a like nature to those forbidden done in connection with every subject within the jurisdiction of the Secretary of the Interior, then the new enumerations made in the amendment were wholly unnecessary because without enumeration they would have been embraced in the statute as amended. Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of a mere amendment to the section of the statutes which was alone concerned with pension and bounty land claims. Construing the statute as relating only to the subject of pension and bounty land claims coming within the authority of

the Commissioner of Pensions of the Secretary of the Interior, it follows that a violation of its provisions could not arise from the acts charged in the indictment concerning the coal-land entries.

See also *U. S.* vs. *Salen,* 235 U. S. 237.

It is my belief that the principle involved in the present case is closely parallel to that applied in those just cited.

Counsel for the Government have cited a number of cases as supporting its contention that Section 80 (a) can be made to apply to the present indictment. A few of them will be analyzed to demonstrate what is believed to be the lack of application. In *Mellon* vs. *U. S.*, 96 Fed. (2d) 462, the very language quoted by counsel shows that Mellon and his associates were charged with a conspiracy to commit the offense of "obtaining a modernization loan of $575" under the provisions of Tit. 1, Section 2 of the National Housing Administration Act (Tit. 12, Section 1703 U. S. C.), "which application and loan were matters within the jurisdiction of the Federal Housing Administration, an agency of the United States." Plainly, the well understood object of Section 35 of the Criminal Code to protect the Government against frauds heretofore discussed, was involved.

The case of *Hammerschmidt* vs. *U. S.*, 265 U. S. 182, also cited, I think, supports the conclusion reached in the present case. Counsel quote an excerpt therefrom to the effect that "* * * it is not necessary that the Government shall be subjected to pecuniary loss * * *." This is true

of any indictment for conspiracy, that is, it does not have to be charged as having succeeded, but the commission of any overt act in furtherance thereof is sufficient. Hammerschmidt was charged, with others, with conspiracy "to defraud the United States by impeding, obstructing, and defeating a lawful function of its Government * * *," to wit: the execution of the Selective Service Act of May 18, 1917 (Chap. 15, 40 Stat. 76). Chief Justice Taft stated that the indictment was based upon certain language of Justice Lurton in *Haas* v. *Henkel,* 216 U. S. 462, to the effect that "if two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the conspiracy, all the parties to such conspiracy shall be liable," etc. In sustaining the position of the defendants that the Selective Service Act could not properly be brought within the reach of such a charge; Justice Taft at Page 187 said:

> It is obvious that the writer of the opinion and the Court were not considering whether deceit or trickery was essential to satisfy the defrauding required under the statute. The facts in the case were such that that question was not presented. The deceit of the public, the trickery in the advance publication secured by bribery of an official, and the falsification of the reports, made the fraud and deceit so clear as the gist of the offenses actually charged that their presence was not in dispute. The sole question was whether the fraud there practised must have inflicted upon the Government pecuniary

loss, or whether its purpose and effect to defeat a lawful function of the Government and injure others thereby was enough. That was all that Mr. Justice Lurton's words can be construed to mean. The cases in which this case has been referred to involved unquestioned deceit or false pretense, and it was only cited in them to the point that financial loss of the Government is not necessary to violate the section. *United States* v. *Foster,* 233 U. S. 515, 526; *United States* v. *Barnow,* 239 U. S. 74, 79. See also *United States* v. *Plyler,* 222 U. S. 15, in respect to #5418, Rev. Stats.

To conspire to defraud the United States means to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods among frauds. In *Horman* v. *United States,* 116 Fed. 350, #5480, Rev. Stats., as amended March 2, 1889, c. 393, 25 Stat. 873, making it a crime to devise any scheme or artifice to defraud by use of the mails and opening correspondence with any person, and to mail

a letter in execution thereof, was held to be violated by the sending of a letter threatening to blacken the character of another unless that other paid the blackmailer money. It was held that the word "scheme" in that section was of broader meaning and did not necessarily involve trickery or cunning in the scheme, if use of the mails was part of it; that intent to defraud in such a statute was satisfied by the wrongful purpose of injuring one in his property rights. The question had much consideration. The decision, however, went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. Section 5480 has since been again amended to make its scope clearer. Its construction in the Horman Case cannot be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it.

I think the language thus quoted also effectively disposed of *Haas* v. *Henkel, supra,* cited by the Government in the present case.

Counsel for the Government have also cited the case of *Claude E. Spivey* v. *U. S.*, No. 9038, in which the opinion was handed down by the Court of Appeals for this Circuit on January 15, 1940. There the indictment charged offenses under Section 80 (1), 83 (2), and 338 of Tit. 18 of the U. S. C. A. It involved use of the mails to defraud, the "making of false and fictitious statements in violation of Section 80," and a "conspiracy to defraud the Government by obtaining payment or allow-

ance of false or fraudulent claims." The facts charged were summarized by the Court as follows:

> Defendants, owners of a cotton gin and warehouse, in pursuance of a scheme, by false pretenses and practices to obtain moneys from and through the Commodity Credit Corporation, in which the United States of America was a stockholder and which was an agency of the United States, would induce farmers bringing their cotton to be ginned, to sign in blank, notes and loan agreements, commonly known as Commodity Credit Corporation Cotton producer's notes. The notes and agreements so signed would be padded, that is, filled out from sums in excess of the amounts actually obtained by the farmers thereon, and with bales of cotton, which the signers thereof had not raised or claimed; in some instances the names of makers of the notes would be forged. Thereupon defendant would take the notes to divers and sundry banks and secure credit thereon, and the banks, believing the notes were genuine, would assign them to the Commodity Credit Corporation.
>
> The charge in the eighteen counts under Section 80, was that the notes and cotton agreements aforesaid, would be fraudulently and fictitiously prepared and altered, so as to show thereon, sums of money and bales of cotton in excess of the amounts obtained and bales owned by the purported signers of the notes. Count twenty, charged that the things done by the defendants were and amounted to, an agreement or conspiracy to defraud the Government by obtaining or aiding to obtain, the payment or allowance of false or fraudulent claims.

From the second paragraph of the quotation it can readily be seen that in so far as Section 80 of Tit. 18 of the Code was concerned, the charge covered false, forged, and fictitious papers, seeking to fraudulently obtain money from the Government. Counsel have referred to the following language as supporting their contention:

> The points made as to the convictions under Section 80 are no better taken. The language of the section is plain and completely comprehensive, and that it was intended to, and does apply to situations of the kind in question here, is equally plain. For, it stands admitted, not only that the Commodity Credit Corporation is an agency of the United States, and that the matters in question were the lending of money on farmer's notes, which come within the scope of its agency, but that the United States, though the stock is nominally held by officials of the Government, is the owner and beneficial holder of all of its stock. This being so, the fact that the stock is not in the name of the United States is immaterial. *The force and effect of statutes of this kind, designed to prevent frauds upon the Government may not be frittered away by a mere literal construction.* Read as a whole, it is perfectly plain, we think, that the statute includes the Commodity Credit Corporation, a creation of the Government, which its stock by the statutes of its creation, standing in the name of officials of the United States. Equally untenable is appellee's argument that the Section must be held to be limited to claims against, and as not extending to, negotiations with, the Government. While Criminal Statutes may not by process of

> construction, be extended beyond their natural and reasonable meaning, neither may they be, by the same process, deprived of their natural meaning. The statute makes it an offense to "falsify or cover up, by any trick, scheme, or device, a material fact, or make or cause to be made, any false or fraudulent statements * * * in any matter within the jurisdiction of any department or agency, etc." *The facts disclose falsification, tricks, schemes, and devices in matters within the jurisdiction of the Commodity Credit Corporation, the Corporation covered by the Act. The fact that the Act in other portions deals with claims against the Government, does not, in any manner take from its force when dealing with other matters than claims.*

They relied particularly upon the last two sentences just quoted. However, the decision shows plainly that it was dealing with the facts alleged as hereinabove quoted, involving a scheme to defraud the Government, and I think its import must be restricted accordingly. In any event, I do not consider the case authority for the contention of the Government in the present one.

Notwithstanding, I have concluded that Section 35 of the Criminal Code does not apply, yet I am of the opinion that the first count of the indictment sufficiently charges a conspiracy to violate the Connally Act. It can make no difference that the allegations of fact were also intended to show an unlawful undertaking to commit offenses under Section 35 of the Criminal Code. The following is

quoted from the indictment to demonstrate that the conspiracy was also laid under the Connally Act.

> * * * produce and cause to be produced oil from certain leases hereinafter described, situated in Gregg and Upshur Counties, Texas, and within jurisdiction of this Court, which oil would be produced in violation of the laws of Texas, and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases. Certain others of the said defendants were to, without lawful authority and without approved tenders or permits of the Railroad Commission of Texas or the Federal Tender Board No. 1 of Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg County, Texas, or cause the same to be done, and certain others of said defendants were to refine the said unlawfully produced oil so transported, and manufacture it into contraband products at the said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of the said defendants were to sell, ship, and deliver into interstate commerce, the said contraband products so manufactured and cause the same to be done without lawful authority and in violation of the laws of the United States.

This, I believe, is sufficient. See *Short* v. *U. S.*, 91 Fed. (2d) 969; *Capone* v. *U. S.*, 51 Fed. (2d) 609.

Without finding it necessary to discuss the contentions of the defendants in regard to the insuffi-

ciency of the allegations of the conspiracy, I think it suffices to say that all of the information needed is given to enable the defendants to plead thereto.

My conclusion is that the demurrer should therefore be overruled as to count one and sustained as to the remaining ten counts of the indictment.

Thus READ, DONE, and SIGNED at Chambers on this the ——— day of February 1940.

BEN C. DAWKINS,
United States District Judge of the
Western District of Louisiana.

INDORSEMENT: Filed, Feb. 20, 1940. Lee Simmons, Clerk U. S. Court. By (S). Susie Kerr, Deputy.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 245

THE UNITED STATES OF AMERICA, APPELLANT

v.

J. W. GILLILAND, RALPH GILLILAND, FRED. A. WILLIAMS, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 43–59) is not reported.

JURISDICTION

The judgment of the District Court sustaining a demurrer to ten counts of the indictment was entered on May 16, 1940 (R. 61), and the order allowing an appeal on June 12 (R. 64). Probable jurisdiction was noted by this Court on October 14, 1940. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as

amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

1. Whether Section 35 of the Criminal Code (U. S. C., Title 18, Sec. 80) as amended June 18, 1934, to prohibit the making or using of knowingly false statements and affidavits "in any matter within the jurisdiction of any department or agency of the United States" applies where the matter does not involve the money or property of the Government.

2. Whether this Court may consider the effect of a later statute as an implied repeal *pro tanto* of the statute on which the indictment was based when the issue was raised in support of the demurrer but was not determined by the District Court.

3. Whether Section 35 as amended, in so far as it would apply to the filing with a Federal Tender Board, pursuant to regulations under the Connally Act, of knowingly false monthly affidavits as to the amount of oil produced and received, was impliedly repealed *pro tanto* by the enactment of the Connally Act.

STATUTES AND REGULATIONS INVOLVED

The portion of Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, c. 587, 48

Stat. 996, which is codified as Section 80 of Title 18 of the United States Code, is set forth in Appendix A, *infra*, p. 36. Sections 5 and 6 of the Connally "Hot Oil" Act of February 22, 1935, c. 18, 49 Stat. 30, 31–32 (U. S. C., Supp. V, Title 15, Secs. 715 d and e), are set forth *infra* pp. 37–38. Executive Order No. 6979, Regulation XIV of Executive Order No. 6980–B, and Executive Order No. 6980–C, promulgated under the Connally Act, are set forth *infra* pp. 39–42.

STATEMENT

The appellees (hereinafter referred to as "the defendants") were indicted on February 21, 1938, in the United States District Court for the Eastern District of Texas (R. 1–27). The indictment charged, in the first count, a conspiracy to violate Section 35 of the Criminal Code and the Connally Act and, in ten other counts, substantive offenses under Section 35. The defendants demurred to the indictment (R. 27–43). Their demurrer was overruled as to the conspiracy count and sustained as to the substantive counts (R. 61).

Eight of the substantive counts (2–9, inclusive, R. 9–22) alleged in substance that the defendants knowingly and wilfully caused to be filed with Federal Tender Board No. 1, Kilgore, Texas, a Monthly Producer's Report in the name of Oil, Inc., on a form provided by the United States Department of the Interior, Petroleum Administration, verified under oath by one of the defendants, which falsely stated the amount of petroleum pro-

duced during the month from designated oil wells. The tenth and eleventh counts similarly charged the filing of Monthly Pipe Line and Storage Reports in the name of Gilliland Refining Company, verified by one of the defendants, which falsely stated the amount of crude petroleum received from various producers. Each of the counts alleged that the affidavits were known to contain "false and fictitious statements relating to a matter within the jurisdiction of the Department of the Interior and the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas."

The District Court held the substantive counts insufficient under Section 35 of the Criminal Code on the ground that the clause of that section, upon which they were based, applies only to "claims against, rights to, or controversies about funds or property involved in 'operations of the Government'" (R. 52). The opinion relied upon the doctrine of *ejusdem generis* to limit the broad language of the amendment of June 18, 1934, upon which the Government relied, to matters similar to those dealt with in other clauses of the section, ruled that the legislative history of the amendment is ineffective to "overturn well-established principles of interpretation" (R. 51), pointed to the large disparity between the maximum punishment under Section 35 and that under the Connally Act itself, and stressed the fact that to "hold with the prosecution in this case would be to say that Congress

intended to create a multitude of crimes with respect to operations of the innumerable and ever growing departments, bureaus, and agencies of the Government by the simple means of amending in general terms a statute which had always been understood to apply to matters in which the Government was financially interested" (R. 52).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In sustaining as to counts two to eleven, inclusive, the demurrer to the indictment.

(2) In holding that the portion of Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 (U. S. C., Title 18, Sec. 80), upon which counts two to eleven of the indictment were predicated, applies only to matters in which the Government is financially interested.

(3) In holding that under the doctrine of *ejusdem generis* the words "in any matter within the jurisdiction of any department or agency of the United States," as contained in Section 35 of the Criminal Code as amended, are confined to such matters as claims against, rights to, or controversies about funds or property involved in "operations of the Government."

(4) In holding that the addition of the words "in any matter within the jurisdiction of any department or agency of the United States" to the pertinent portion of Section 35 of the Criminal

Code by the 1934 amendment did not broaden the scope and application thereof.

(5) In disregarding the deletion from the applicable portion of Section 35 of the Criminal Code by the 1934 amendment of restrictive language which had limited its application to false statements, affidavits, etc., in connection with matters involving money or property of the Government.

(6) In disregarding the Report of the Senate Judiciary Committee to the effect that a purpose of the amendments to the pertinent portion of Section 35 of the Criminal Code, which were subsequently incorporated by the 1934 Act, was to reach a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith.

SUMMARY OF ARGUMENT

I

The decision of the District Court that the provision of Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, upon which the indictment was based, applies only to such matters as "claims against, rights to, or controversies about funds or property involved in 'operations of the Government'" is contrary to the specific language of the 1934 amendment and to the articulate purpose evidenced by its legislative history.

Prior to 1934, the provision was limited, as this Court held in *United States v. Cohn*, 270 U. S.

339, to cases where the specified falsifications were made for the purpose of obtaining the approval or payment of a claim against the Government, or of obtaining the money or property of the Government by fraud. The amendment eliminated the words imposing that restriction and substituted a phrase making the prohibition applicable if the falsification was made or used "in any matter within the jurisdiction of any department or agency of the United States * * *." Thus the amendment substituted "jurisdiction" for intent to cause pecuniary or property loss as the measure of the extent of the prohibition. In holding that under the amendment the "matter" must relate to a claim against or controversy about Government property, the District Court has imported into the amended statute a limitation which the language does not contain and which is substantially equivalent to the old limitation which the amendment explicitly removed.

The legislative history of the amendment shows that it was the culmination of an articulate effort to provide a broad sanction against wilful falsification in matters within the jurisdiction of governmental agencies; that to effectuate this purpose the language of the relevant clause of Section 35 of the Criminal Code was deliberately changed to eliminate the existing restrictions to cases involving attempts to obtain the money or property of the Government; and that the use of false affidavits in

connection with the regulation of "hot" oil shipments was one of the two specific instances which prompted the enactment of the amendment and which the amended statute was designed to reach. The use of false affidavits under the Connally Act is not significantly different from their use under the system of regulation established under Section 9 (c) of the National Industrial Recovery Act, in force at the time when the amendment to Section 35 of the Criminal Code was made. It is, therefore, literally true that the decision of the District Court contravenes not only the general purpose of the amendment, but one of its specific purposes as well.

Neither the principle of *ejusdem generis*, the broad scope of the statute, nor the disparity between its penalty and that provided for violations of the Connally Act, relied upon by the District Court, affords any justification for imposing upon Section 35 a restriction which is contrary both to the meaning and to the purpose of the amendment of 1934. The decision of the District Court is, moreover, contrary to that of the other courts which have passed upon the issue.

II

Section 35 of the Criminal Code, as amended, was not impliedly repealed by the Connally Act, in so far as it would apply to the filing of false affidavits with the Federal Tender Board created pursuant to the Act. This issue was not specifically passed upon by the District Court and it may be

doubted, therefore, whether the question is open in this Court on the Government's appeal, under the rule enunciated in *United States* v. *Borden Co.*, 308 U. S. 188, 206–208. In any event, it is plain that no implied repeal occurred. The Connally Act is in no way inconsistent with Section 35 of the Criminal Code and there is no evidence that it was intended to provide the exclusive sanction for dealing with falsification in affidavits filed under the system of enforcement authorized in general terms by Section 5. In so far as the Executive Order promulgated under the Connally Act covers the same ground as Section 35, it provides no more than a "cumulative, or auxiliary" sanction, paralleling not only Section 35, but the perjury statute as well. While there is no evidence that the Connally Act was intended to work an implied partial repeal of the provision of Section 35 of the Criminal Code which applies to false affidavits there is, on the other hand, convincing evidence that no such repeal was meant.

ARGUMENT

I

SECTION 35 OF THE CRIMINAL CODE AS AMENDED IN 1934 PROHIBITS THE MAKING OF FALSE STATEMENTS AND AFFIDAVITS IN MATTERS WITHIN THE JURISDICTION OF ANY DEPARTMENT OR AGENCY OF THE UNITED STATES WHETHER OR NOT THE MATTER CONCERNS A CLAIM AGAINST THE GOVERNMENT OR PROPERTY "INVOLVED IN OPERATIONS OF THE GOVERNMENT"

The decision of the District Court that Section 35 of the Criminal Code as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996, applies only to

such matters as "claims against, rights to, or controversies about funds or property involved in 'operations of the Government'" (R. 52) is contrary to the specific language of the 1934 amendment and to the articulate purpose evidenced by its legislative history.

A. THE LANGUAGE OF THE 1934 AMENDMENT

Prior to 1934 the portion of Section 35 of the Criminal Code which comprises Section 80 of Title 18 of the United States Code provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval * * * any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, *for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder,* shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher,

> roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both (40 Stat. 1015–1016). [Italics ours.]

In *United States* v. *Cohn*, 270 U. S. 339, 347, this Court held that the provision did not apply to the obtaining of non-dutiable merchandise from a collector of customs, upon the posting of a bond, by falsely representing that the bill of lading had not arrived when in fact it was held by a bank for payment of the attached draft. The reference to presenting a "claim upon or against" the Government was held to relate "solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant" (pp. 345–346); and the reference to "defrauding the Government" was held to relate "to the fraudulent causing of pecuniary or property loss". In this connection the opinion pointed to "the context of the entire section [35] which deals with the wrongful obtaining of money and other property of the Government, with no reference to the impairment or obstruction of its governmental functions." (p. 347.)

Such was the language and interpretation of the governing provision of the statute when Congress enacted the amendment of June 18, 1934. By that amendment the words italicized above (p. 10) were

deleted and there was inserted, after the word "entry," (p. 11) the following phrase: "in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder."[1] The phrase confining the scope of the provision within the limits defined by this Court in *United States* v. *Cohn*, *supra*, was thus eliminated. A new phrase was added defining its scope not in terms of the purpose of the falsification but rather in terms of the nature of the proceeding in which it is made. Under the amended statute the specified falsehoods are condemned whether or not they are used to obtain the payment or approval of a claim against the Government or to defraud it of money or property. It is enough that the deception is practiced in a matter "within the jurisdiction" of a department or agency of the United States. If the District Court had looked to the words *eliminated* as well as those *added* by the amendment, it would have been abundantly clear that the essence of the change was to substitute "jurisdiction" for intent to cause pecuniary or property loss as the measure of the ex-

[1] The reference to "any corporation in which the United States of America is a stockholder" first appeared in the statute (*supra*, p. 10) by virtue of an amendment by the Act of October 23, 1918, c. 194, 40 Stat. 1015. It was held in *United States* v. *Walter*, 263 U. S. 15, 18, "to refer only to corporations like the Fleet Corporation that are instrumentalities of the government and in which for that reason it owns stock," an interpretation made to avoid constitutional doubt.

tent of the prohibition. In holding that under the amendment the "matter" must relate to a claim against or a controversy about government property [2] it is obvious that the District Court has imported into the amended statute a limitation which the language does not contain and which, moreover, is substantially equivalent to the old limitation which the amendment explicitly removed.

B. THE LEGISLATIVE HISTORY OF THE AMENDMENT

The legislative history of the 1934 amendment shows that it was intended to eliminate the requirement that the falsification threaten the pecuniary interests of the Government. It shows, moreover, that the amendment was intended to render the prohibition of the statute applicable to precisely the type of falsification alleged in the instant case.

First. The legislation apparently originated in a bill recommended in February, 1934 by the Secretary of the Interior to make punishable by imprisonment for not more than five years or a fine not exceeding $5,000

> every person who knowingly or wilfully makes * * * or in anywise procures

[2] The opinion of the District Court speaks of funds or property "involved in 'operations of the Government'" (R. 52), a phrase derived from the title of the chapter of Title 18 of the United States Code in which Section 80 appears. The Court does not indicate that this formula is intended to mean anything more than money or property owned by the Government or with respect to which it has a proprietary interest and the opinion as a whole suggests that it does not.

> the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, or paper or writing purporting to be such, concerning any application, bond, bid, loan or payment thereof, or pertaining to any other matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry * * *.

The bill was introduced as S. 2086, 73d Cong., 2d Sess. (78 Cong. Rec., Pt. 2, pp. 2151–2152) and H. R. 8046 (78 Cong. Rec., Pt. 3, p. 2707). The Secretary's letter, which in the Senate was printed with the bill, contained the following explanatory statement (78 Cong. Rec., Pt. 2, p. 2152; S. Rep. No. 288, 73d Cong., 2d Sess.; H. Rep. No. 829, 73d Cong., 2d Sess., p. 2):

> A large number of cases are arising constantly in the enforcement of the laws relating to the Interior Department; the transaction of business in connection with the Public Works Administration; in violations of the code of fair competition for the petroleum industry; and enforcement of regulations under section 9 (c) of the National Industrial Recovery Act of June 16, 1933, which are not susceptible of successful prosecution on charges of perjury, and there is no law at present under which prosecutions may be secured for the presentation of false papers.

The bill was favorably reported by the Senate Committee on the Judiciary (S. Rep. No. 288, *supra*). On the floor of the Senate it was amended to make it applicable to any matter "within the jurisdiction of any department or agency of the Federal Government" rather than to the Department of the Interior alone. Thus amended, it passed the Senate (78 Cong. Rec., Pt. 3, p. 2859). In the House of Representatives the bill was favorably reported (H. Rep. No. 829, *supra*), after the Committee had condensed the language and broadened its scope to apply to any department or agency of the Government or Government-owned corporation but had narrowed the ambit of the prohibition by requiring that the forbidden acts be done *"with intent to defraud the United States."* (See 78 Cong. Rec., Pt. 4, pp. 3724-3725.) In this modified form the bill passed the House (78 Cong. Rec., Pt. 4, p. 3725). The Senate agreed to these amendments by passing the House bill (78 Cong. Rec., Pt. 6, p. 5746). On April 17, 1934, the measure was vetoed by the President, whose message stated that the offenses involved were already condemned by Section 35 of the Criminal Code (U. S. C., Title 18, Sec. 80) carrying a punishment of not more than ten years imprisonment or a fine of not more than $10,000 and that the "bill is objectionable in that its result would be to reduce the punishment for certain

frauds against the United States" (78 Cong. Rec., Pt. 6, pp. 6778–6779).

Following the presidential veto the Secretary of the Interior renewed the recommendation which had resulted in the passage of the vetoed bill. On May 2, 1934, he wrote to the Chairman of the Senate Committee on the Judiciary [3] calling attention to the veto and enclosing a proposed bill [4] which differed from that which had been vetoed in that it did not require "an intent to defraud the United States" and provided a penalty of imprisonment up to 10 years and a fine not exceeding $10,000. Again the Secretary stated that the proposal "is intended to reach the large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid."

The bill was introduced by Senator Ashurst on May 3 (S. 3527, 73d Cong., 2d Sess.)[4] but the

[3] His letter, set forth in Appendix B, *infra*, pp. 43–44, appears in the Committee's file on S. 3527, 73d Cong., 2d Sess.

[4] It provided: "That every person who knowingly or willfully makes or aids, or assists in the making, or in anywise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, paper, or writing purporting to be such, concerning any application, bond, bid, loan or payment thereof, or pertaining to any matter within the jurisdiction of any Federal department, estab-

recommendation which it embodied apparently bore fruit in the Senate in a different way. The Judiciary Committee had before it a bill (H. R. 8912) passed by the House to amend the portion of Section 35 of the Criminal Code which appears in Title 18 of the United States Code as Section 82, by providing for the punishment of injury to and depredations against Government property. That bill had been recommended by the Attorney General (H. Rep. No. 1463, 73rd Cong., 2d Sess.), had passed the House on May 5, 1934 (78 Cong. Rec., Pt. 8, pp. 8136–8137), and had been referred to the Senate on May 7 (78 Cong. Rec., Pt. 8, p. 8154), a few days after the Secretary's letter to the Chairman of the Senate Committee. The Senate Judiciary Committee approved the bill enacted by the House, with a clarifying modification and two new amendments to a clause of Section 35 which the House bill did not affect. These new amendments worked the changes in Section 35 which are in issue here, eliminating from the second clause the phrase requiring an intent to obtain the payment of a claim or to defraud the Government and inserting the phrase rendering the prohibition broadly applicable to any matter within the jurisdiction of any department or agency of the United States (78 Cong. Rec., Pt.

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lishment, agency, office, board, or commission, shall be punished by a fine not exceeding $10,000 or by imprisonment for a term of not more than ten years, or by both such fine and imprisonment."

10, pp. 11270–11271). In explanation of these amendments, the Committee report said (S. Rep. No. 1202, 73d Cong., 2d Sess., p. 1):

> The first two committee amendments were proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of "hot" oil where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation and false certificates are made as to the actual wages paid.

The bill became law in the form in which it was recommended by the Senate Committee. It passed the Senate on June 13, 1934 (78 Cong. Rec., Pt. 10, p. 11271),[5] and on June 14 the Senate Amendments were read in the House which concurred without discussion (78 Cong. Rec., Pt. 11, p. 11513).

The history of the Act of June 18, 1934, thus leaves no room for doubt that the relevant clause of Section 35 of the Criminal Code was amended

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[5] In explaining the proposed amendment to the Senate, Senator King, speaking on behalf of the Judiciary Committee, did not refer specifically to "hot" oil cases, but he did make the following relevant statement: "There is nothing which permits us to make an investigation and prosecute persons who are engaged in the 'kick-back' practice. They make false returns, claiming that they paid certain amounts to their employees, when they have not done so. This bill just amends the law so as to give the Federal Government authority to deal with that class of cases" (78 Cong. Rec., Pt. 10, p. 11270). There was no discussion.

for the precise purpose of providing a broad sanction against wilful falsification in matters within the jurisdiction of governmental agencies; that to effectuate this purpose the language was deliberately changed to eliminate the existing restriction to cases involving attempts to obtain the money or property of the Government; and that the use of false affidavits in connection with the regulation of "hot oil" shipments was one of the two specific instances which prompted the enactment of the amendment and which the amended statute was designed to reach.

Second. It is of course true that in speaking of the "large number of cases involving the shipment of 'hot' oil, where false papers are presented" both the Senate Committee and the Secretary of the Interior referred to cases arising under Section 9 (c) of the National Industrial Recovery Act of June 16, 1933, c. 90, 48 Stat. 195, 200, and the regulations promulgated thereunder, rather than to cases under the Connally Act, which had not yet been passed. Since the legislation was deliberately framed in general terms, this distinction would not be material even if the false affidavits alleged in the present indictment were markedly different in nature and function from the "false papers" which called for legislative attention in 1934. The fact is, however, that they are not. The system of enforcement created under the Connally Act is substantially the same as that prevailing when this Court held Section 9 (c) unconstitu-

tional in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; and the system prevailing at that time was simply an elaboration upon that prevailing in the spring of 1934.

Until October 18, 1934, the regulations promulgated by the Secretary of the Interior under Section 9 (c) required in substance that producers file monthly affidavits with the Division of Investigations of the Department of the Interior setting forth their daily production and their sales and affirming that no petroleum had been produced or withdrawn from storage in violation of state law; that purchasers, shippers, and refiners file monthly affidavits of their receipts; and that transporting agencies receive no petroleum for shipment without an accompanying affidavit of the shipper that the oil was lawfully produced and withdrawn. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 405–408. This was the "affidavit system" of control (Frey, *The Connally Act: Background*, in National Resources Committee, Energy Resources and National Policy, Part IV, Section II, p. 394) which was in operation in June 1934, when Section 35 of the Criminal Code was amended.* On October

*It is not without interest that when new forms for use in the East Texas area were approved by the Secretary of the Interior on July 20, 1934, by an order under Sections 9 (c) and 10 (a) of the National Industrial Recovery Act, they directed attention to the penalty under Section 35 and quoted the language of the amended clause (Forms O. E. S. 1, 2, 3, 4, 5, 6, Department of Interior, Division of Investigations).

18, the system was strengthened by the establishment, upon the order of the Secretary of the Interior, of a Federal Tender Board for east Texas. Under the new regulations of that date, a certificate of clearance, issued by the Board, was substituted for an affidavit of legality as the condition precedent to the movement of petroleum from the east Texas field. The "tender" system did not, however, eliminate the affidavits or reduce their importance; it provided a method for utilizing them more efficiently. As the Secretary of the Interior stated in his Annual Report for 1935 (p. 36):

> Certificates of clearance, or tenders, were approved by the Federal Tender Board when the petroleum or petroleum products were shown on the basis of the applicant's reports, the accounting record, and the specific examination of examiners to have been produced in accordance with the quotas established by the Railroad Commission of Texas.

The system of monthly affidavits and tenders continued until the decision in the *Ryan* case on January 7, 1935, and was speedily re-established upon the passage of the Connally Act shortly thereafter [7] (Act of February 22, 1935, c. 18, 49 Stat. 30).

[7] Section 5 (a) of the Connally Act (Appendix A, *infra*, p. 37) authorizes the President to prescribe regulations for the enforcement of that Act, including regulations requiring reports, affidavits, etc., relating to the production and disposition of petroleum. Section 5 (b) authorizes the President to require certificates of clearance for petroleum prod-

It is, therefore, literally true that the decision of the District Court that the amendment of Section 35 of the Criminal Code by the Act of June 18, 1934 is inapplicable to monthly affidavits filed with the Federal Tender Board pursuant to the Connally Act contravenes not only the general purpose of the amendment but one of its specific purposes as well.

C. THE GROUNDS OF DECISION ADDUCED BY THE DISTRICT COURT

First. The District Court refused to consider the

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ucts moving in interstate commerce from any particular area and to establish a board in such area to issue clearance certificates. By Executive Order No. 6980–B, approved by the President March 1, 1935, regulations were promulgated. Regulation XIV, *infra*, p. 39, requires producers, refiners, and others to file with the Board in their area monthly reports under oath on forms approved by the Secretary of the Interior. By Executive Order No. 6980–C, approved by the President March 1, 1935, *infra*, pp. 40–42, Federal Tender Board No. 1 was created, the regulations were declared to apply to all petroleum originating in the East Texas Field and forms for reports and affidavits were specifically approved, including Forms C and D involved in the instant case.

That Congress has regarded the Connally Act as a continuation by constitutional means of the policies worked out under Section 9 (c) of the National Industrial Recovery Act is clear from the history of its enactment in 1935 and of its extension by the Act of June 14, 1937, c. 335, 50 Stat. 257, and, again, by the Act of June 29, 1939, c. 250, 53 Stat. 927. See S. Rep. No. 14, 74th Cong., 1st Sess., pp. 1, 3; H. Rep. No. 148, 74th Cong., 1st Sess., pp. 2–5; H. Rep. No. 817, 75th Cong., 1st Sess., pp. 5–6; H. Rep. No. 807, 76th Cong., 1st Sess., p. 2; 79 Cong. Rec., Pt. 1, 753, 760, Pt. 2, 2124, 2135, 2150; 81 Cong. Rec., Pt. 5, 5321; 84 Cong. Rec., Pt. 7, 7555, 7559, 7573.

legislative history of the amendment as an aid to determining the question of construction raised by the demurrer. It held, instead, that the doctrine of *ejusdem generis* requires that the clause of the statute amended in 1934 be confined to matters similar to those dealt with in the other and unamended clauses. It held further that the language, thus limited, is too clear to permit resort to extrinsic aids. The position is inconsistent and indefensible. If language can ever be too plain to admit of extrinsic aids to interpretation (cf. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542–544; *United States* v. *Dickerson,* 310 U. S. 554, 561–562), it must surely be the language as written, not the language as read with the aid of a "rule" of construction. If *ejusdem generis* was admissible as an aid to interpretation so was legislative history—and by a clearer right of entry. Like other canons of construction, *ejusdem generis* is a guide to the ascertainment of meaning, not a judicially imposed principle to which legislation must conform (cf. *Texas* v. *United States,* 292 U. S. 522, 534; *Mason* v. *United States,* 260 U. S. 545, 554). In the process of judicial interpretation it may be an item of evidence; it is not an irrebuttable presumption. As an item of evidence, its weight rests upon the psychological and grammatical probability that general words were employed with the specific reference suggested by their context. It is therefore without weight where, as here, the nature and back-

ground of the amendment clearly show that general words were employed without regard to the context of the other clauses of the section for the special purpose of removing the type of limitation contained in those clauses. The District Court used the principle as a justification for ignoring the very considerations which indicate its inapplicability; its decision is refuted by the legislative materials which it refused to take into account (cf. *United States* v. *Dickerson, supra,* at p. 562).

United States v. *Keitel,* 211 U. S. 370, upon which the District Court relied (R. 52–54), affords no support for this result. In that case, the second count of the indictment charged a conspiracy to violate Section 4746 of the Revised Statutes, as amended by the Act of July 7, 1898, c. 578, 30 Stat. 718, by making and presenting false affidavits in connection with entries on coal lands. Section 4746, before the amendment, provided for the punishment of persons who procure the making or presentation of any false or fraudulent affidavit "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions." The amendment added following the words "Commissioner of Pensions" the words "or of the Secretary of the Interior" and made other changes which did not alter the reference of the section as a whole to pension claims. The Government contended that

by including the Secretary of the Interior, the amendment broadened the scope of the statute to cover the presentation of false affidavits in any matter before the Secretary, whether or not it was a matter of the sort that might fall within the jurisdiction of the Commissioner of Pensions. This Court rejected the contention on the ground that when "the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of the amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the Commissioner of Pensions" (211 U. S. at p. 396). Unlike the present case, the amendment did not provide for the repeal of the restrictive language of the provision and there was no legislative history to indicate an explicit purpose to broaden the scope of the statute in the manner which the Government urged. Nothing in the opinion of this Court suggests that the principle of *ejusdem generis* transcends the experiential ground upon which it rests, and while, as Mr. Justice Holmes observed, "every question of construction is unique" (*United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402), the problem

of interpretation in the *Keitel* case presented none of the features which are determinative of the issue here.

Second. In addition to *ejusdem generis* the District Court emphasized the broad scope which the Government's contention would afford to Section 35 and the disparity between the maximum penalty of ten years imprisonment and $10,000 fine under that section and six months imprisonment and $2,000 fine under the Connally Act, itself. These considerations were apparently thought to point to an absurdity to be avoided by an interpretation confining the general language of the amendment within the limits accorded to the statute before the amendment was made.

Even if the consequences of the amendment were absurd, the District Court had no authority to ignore an explicit purpose to produce them and to nullify an enactment couched in words clearly adequate to effectuate that purpose.[8] The difference between the maximum penalty provided by Section 35 and that under the Connally Act is not substantially greater than the difference between the penalty under Section 35 and those provided by the National Industrial Recovery Act, appli-

[8] This Court has held that "the reasons for and significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used" even when the same considerations would have been inadmissible to impeach that meaning. *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269.

cable to "hot" oil cases when Section 35 was amended in 1934.[9]

But more than this, the consequences of the amendment were not absurd. For what the amendment did, in substance, was to apply the policy against falsehood embodied in the traditional law of perjury to cases to which the sanctions of perjury might not apply, either because of the absence of an oath or of a "law of the United States" authorizing an oath to be administered (Criminal Code, Sec. 125, U. S. C., Title 18, Sec. 231). That the specified falsifications "in matters within the jurisdiction of any department or agency of the United States" merited broad condemnation was plainly a reasonable determination for Congress to make, especially at a time when the responsibilities of executive agencies were being increased on a large scale. The fact that the prohibited falsification might in some instances be a step leading to the commission of another crime punishable by a less severe penalty is no more anomalous than the similar possibility in the case

[9] The maximum penalty provided by the National Industrial Recovery Act for violating a Presidential order issued under Section 9 (c) was six months imprisonment and a fine of not more than $1,000. The penalty provided for violating an order issued under Section 10 (a) of the Act was six months imprisonment and a fine of not more than $500. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 406–407. The "hot" oil cases to which the Senate Committee report refers were, of course, subject to prosecution under these provisions.

of perjury.[10] The statute speaks in general terms and the penalty provided is a maximum, not a minimum. The District Court is free to take into account, in imposing sentence upon conviction for the falsification, the legal and moral quality of the end which the false statement was designed to achieve. If, nonetheless, there is support for the view that the sanction chosen was excessive—judging in terms of the "meager and uninterpreted experience" which must be relied upon in such matters (*Tigner* v. *Texas,* 310 U. S. 141, 148), there is no support for the view advanced by the court below that Congress could not conceivably have chosen it. In taking that position, the court succumbed to the "danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views" *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 544) and permitted "attempted interpretation of legislation" to become "legislation itself" (*Palmer* v. *Massachusetts,* 308 U. S. 79, 83).

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[10] It is significant in this connection that the bill first enacted by Congress, in the development of the legislation in question, provided a maximum punishment of five years imprisonment and $5,000 fine, substantially the same as the punishment for perjury, and that the bill was vetoed by the President on the ground that the penalty was half that provided by Section 35 of the Criminal Code. See pp. 15–16, *supra.* Thus the attention of Congress was specifically directed to Section 35 and to the penalty provided by that section.

Third. It may be added that none of the other courts which have passed on the effect of the 1934 amendment to Section 35 of the Criminal Code has expressed a doubt that the effect of the amendment was to make the prohibition of the statute applicable whether or not the falsification threatened the money or property of the Government.[11] In *United States* v. *Goldsmith*, 108 F. (2d) 917 (C. C. A. 2d), certiorari denied, 309 U. S. 678, rehearing denied, 310 U. S. 657, the defendant was convicted of violating the statute by procuring the making of false statements to consular officers for the purpose of securing the issuance of quota immigration visas to aliens. The Circuit Court of Appeals rejected the defendant's contention that the statute did not apply and held that under the amendment "the element of pecuniary loss to the government is no longer an essential ingredient of the crime" (p. 919). In the petition for a writ of

[11] *United States* v. *Goldsmith*, 108 F. (2d) 917 (C. C. A. 2d), certiorari denied, 309 U. S. 678, rehearing denied, 310 U. S. 657; *United States* v. *Presser*, 99 F. (2d) 819, 822 (C. C. A. 2d); *United States* v. *Mellon*, 96 F. (2d) 462, 463 (C. C. A. 2d), certiorari denied, 304 U. S. 586; *United States* v. *Crittenden*, 24 F. Supp. 84, 87 (W. D. N. Y.); see also *Spivey* v. *United States*, 109 F. (2d) 181, 185 (C. C. A. 5th), certiorari denied, 310 U. S. 631; *Fuller* v. *United States*, 110 F. (2d) 815 (C. C. A. 9th), certiorari denied October 14, 1940, No. 220, present Term, where the question was not raised in the lower courts or in the petition for certiorari but was mentioned in the Government's brief in opposition and in the petitioner's reply thereto.

certiorari in the *Goldsmith* case, the petitioner complained of this ruling, and in its brief in opposition (No. 729, October Term, 1939, pp. 6–11) the Government argued that the issue is foreclosed by the language and history of the amendment. This Court denied certiorari and subsequently denied rehearing.[12]

II

SECTION 35 OF THE CRIMINAL CODE, AS AMENDED, WAS NOT IMPLIEDLY REPEALED BY THE CONNALLY ACT, INSOFAR AS IT WOULD APPLY TO THE FILING OF FALSE AFFIDAVITS WITH A FEDERAL TENDER BOARD CREATED PURSUANT TO THAT ACT

First. The opinion of the District Court states as one of the defendant's contentions "that the Connally Act was intended to cover the entire field or subject matter of excluding hot oil from Interstate Commerce with the consequent repeal of all other provisions dealing with it" (R. 51). The contention, which was not specifically raised by the appellees in their demurrer to the indictment (R. 27–43), was not passed upon by the District Court, as we read the opinion sustaining the de-

[12] The brief in opposition in the *Goldsmith* case quoted in full, in the Appendix, the opinion below in the instant case and pointed out (pp. 13–14) that the *Goldsmith* case had been brought to the attention of the District Judge and that he had been requested to postpone entry of judgment until this Court acted on the petition for writ of certiorari. While the District Judge postponed entry of judgment, he adhered to his original view after the denial of certiorari in the *Goldsmith* case, and sustained the demurrer (R. 61).

murrer. It might, therefore, be doubted whether the issue is open in this Court on the Government's appeal, under the rule enunciated in *United States* v. *Borden Co.*, 308 U. S. 188, 206–208; although compare *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304. However, the District Court stated the issue broadly: "does section 80 (a), Tit. 18 of the Code apply to the facts charged in the indictment" (R. 48). If the "particular construction of the underlying statute" (*United States* v. *Borden Co.*, 308 U. S. at 207) was that it does not "apply to the facts charged in the indictment," the negation of an implied repeal would be necessary to overturn that construction. It may be suggested, moreover, that where there is an element of choice in stating the question of construction narrowly or broadly, a broad statement of the issue serves to remove the possibility that successive appeals by the Government may be necessary to establish the applicability of the underlying statute to the facts alleged in the indictment.

Second. Assuming then, that the issue of implied repeal is open on this appeal, the Government submits that plainly no such repeal occurred. It is the settled law of this Court that a later statute does not repeal an earlier one by implication unless it bears unmistakable evidence that such as the intention of the legislature; that when "there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U. S. 188, 198; *United*

States v. *Jackson,* 302 U. S. 628, 631; *Posadas* v. *National City Bank,* 296 U. S. 497, 503–504; *United States* v. *Burroughs,* 289 U. S. 159, 164; *General Motors Acceptance Corp.* v. *United States,* 286 U. S. 49, 61–62. The Connally Act is in no way inconsistent with Section 35 of the Criminal Code and there is no evidence that it was intended to provide the exclusive sanction for dealing with falsification in affidavits filed under the system of enforcement authorized in general terms by Section 5. The Connally Act contains no provision punishing false affidavits. It provides a general sanction for violation of the Act or of the regulations promulgated thereunder. It is true that a false monthly affidavit violates Regulation XIV of Executive Order No. 6980–B, promulgated under Section 5, on March 1, 1935 (*infra,* p. 39), which requires that monthly affidavits be filed and that they be truthful. But it can hardly be contended that an executive order issued after the enactment of the Connally Act which condemns the presentation of untruthful affidavits evidences the intention of Congress to repeal, by the statute under which the regulation was promulgated, all the other provisions of law condemning the making of false affidavits. Insofar as the executive order covers the same ground as Section 35, it provides no more than a "cumulative, or auxiliary" sanction (*Wood* v. *United States,* 16 Pet. 342, 363), paralleling not

only Section 35 but the perjury statute as well.[13] That the same act should be subject to prosecution as a felony or as a misdemeanor is one of the commonplaces of contemporary penal legislation. Moreover, the Executive Order covers a broader field than Section 35 for it applies not only to the filing of untruthful affidavits but also to a failure to file.

While there is no evidence that the Connally Act was intended to work an implied, partial repeal of the provision of Section 35 of the Criminal Code which applies to false affidavits, there is convincing evidence that no such repeal was intended. In the first place, as we have pointed out above,[14] the legislative history of the 1934 amendment to Section 35 shows that one of the specific purposes of Congress was to render the prohibition applicable to persons who presented false papers in connection with the shipment of "hot oil," in violation of the regulations promulgated under Section 9 (c) of the Na-

[13] Cf. *Capone* v. *United States*, 51 F. (2d) 609 (C. C. A. 7th), certiorari denied, 284 U. S. 669, holding that Section 35, as applied to the cheating of the Government in an income tax matter, was not impliedly repealed by the income tax statutes dealing with the same subject matter. See also *Madden* v. *United States*, 80 F. (2d) 672 (C. C. A. 1st), holding that the forgery statute (Criminal Code, Sec. 28) was not impliedly repealed by the National Industrial Recovery Act in cases where forgeries were made on documents used to carry out the provisions of the act and regulations thereunder.

[14] See pp. 13–19, *supra*.

tional Industrial Recovery Act, a situation in every way analogous to the presentation of false affidavits to a Federal Tender Board established under the Connally Act.[15] In the second place, when Congress extended the Connally Act in 1937, it had before it a report of the Department of Justice showing that prosecutions had been instituted under Section 35 in cases where false affidavits had been presented to the Federal Tender Board.[16] When the Connally Act was extended in 1939, a specific objection was made at the hearing against the prosecution of false affidavit cases under Section 35 of the Criminal Code and an amendment was proposed to Section 6 of the Connally Act to require that such prosecutions be brought under that Section.[17] Neither in 1937 nor in 1939 is there any Congressional intimation that Section 35 was being applied in a field to which it had been rendered inapplicable by the Connally Act. Finally, the portion of Section 35 of the Criminal Code involved in the instant case, which is codified as Sec. 80, Title 18, of the United States Code, was

[15] See pp. 19–22, *supra*.

[16] See Report on Federal Petroleum Enforcement in East Texas from October 22, 1934, to December 31, 1936, in Hearings before the Subcommittee of the Committee on Finance, United States Senate, 75th Cong., 1st Sess., on S. 790, pp. 31, 33, 39, 43, 45.

[17] See Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess. on S. 1302, H. R. 4547 and H. R. 2308, pp. 135–139.

itself reenacted by the Act of April 4, 1938, c. 69, 52 Stat. 197, with only the omission of a comma, although a substantive change was made in the portion of Section 35 which is codified as Section 82 of Title 18, reducing the penalty provided in cases of petty theft and depredation (See H. Rep. No. 1762, S: Rep. No. 1497, 75th Cong., 3d Sess.). It is clear, therefore, that the enactment of the Connally Act did not affect the operation or scope of Section 35 of the Criminal Code and that this view has had the affirmative acquiescence of the Congress.

CONCLUSION

For the reasons stated, we respectfully submit that the District Court's construction of Section 35 of the Criminal Code, as amended, was erroneous; that the substantive counts of the indictment allege a violation of the statute; and that the judgment sustaining the demurrer should be reversed and the cause remanded for further proceedings.

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NOVEMBER 1940.

APPENDIX A

The portion of Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996, which is codified as Section 80 of Title 18 of the United States Code, provides: [1]

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or *entry,* in any matter within the jurisdiction of any department or agency of the United States

[1] This portion of Section 35 was reenacted by the Act of April 4, 1938, c. 69, 52 Stat. 197, except for the omission of the comma after the italicized word "entry."

or of any corporation in which the United States of America is a stockholder; * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.[2]

Section 5 of the Connally "Hot Oil" Act of February 22, 1935, c. 18, 49 Stat. 30, 31 (U. S. C., Supp. V, Title 15, Sec. 715d), provides, so far as pertinent:

> SEC. 5. (a) The President shall prescribe such regulations as he finds necessary or appropriate for the enforcement of the provisions of this Act, including but not limited to regulations requiring reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products, and providing for the keeping of books and records, and for the inspection of such books and records and of properties and facilities.
>
> (b) Whenever the President finds it necessary or appropriate for the enforcement of the provisions of this Act he shall require certificates of clearance for petroleum and petroleum products moving or to be moved in interstate commerce from any particular area, and shall establish a board or boards for the issuance of such certificates. A certificate of clearance shall be issued by a board so established in any case where such

[2] Other portions of Section 35 of the Criminal Code are codified as Secs. 82, 83, 84, 85, and 86 of Title 18 of the United States Code. By the Act of April 4, 1938, c. 69, 52 Stat. 197, Section 35 was divided into subsections (A), (B), and (C). Those portions which are codified as Secs. 80, 83, 84, and 85 of Title 18 were grouped in subsection (A); the portion codified as Sec. 86 was made subsection (B); and the portion codified as Sec. 82 was made subsection (C).

board determines that the petroleum or petroleum products in question does not constitute contraband oil. Denial of any such certificate shall be by order of the board, and only after reasonable opportunity for hearing. Whenever a certificate of clearance is required for any area in any State, it shall be unlawful to ship or transport petroleum or petroleum products in interstate commerce from such area unless a certificate has been obtained therefor.

* * * * *

Section 6 of the Connally "Hot Oil" Act of February 22, 1935, c. 18, 49 Stat. 30, 32 (U. S. C., Supp. V, Title 15, Sec. 715e), provides:[3]

> SEC. 6. Any person knowingly violating any provision of this Act or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment.

Section 9 (c) of the National Industrial Recovery Act of June 16, 1933, c. 90, 48 Stat. 195, 200, provided:

> (c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any

[3] The duration of the Connally Act was extended for two years by the Act of June 14, 1937, c. 335, 50 Stat. 257, and again for three years by the Act of June 29, 1939, c. 250, 53 Stat. 927.

board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.

Executive Order No. 6979, issued by the President pursuant to the Connally Act, February 28, 1935, provides:

> By virtue of and pursuant to the authority vested in me by section 11 of the Act entitled "An Act To regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (Public Number 14, 74th Congress), I hereby designate and appoint the Secretary of the Interior as the agent of the President to execute all of the powers and functions vested in the President by the said Act except those vested in him by section 4 thereof: *Provided,* that no regulation issued under section 5 (a) of the said Act the violation of which is punishable by fine or imprisonment shall be effective unless and until approved by the President.

Regulation XIV of Executive Order No. 6980–B, promulgated by the Secretary of the Interior under the Connally Act and approved by the President March 1, 1935, provides:

REGULATION XIV

> Each producer, refiner, reclamation plant, casinghead gasoline plant, pipe line, and storer of petroleum or petroleum products

> in any designated area shall file with the Board for said area monthly reports on forms approved by the Secretary of the Interior. Each report on such forms shall be subscribed and sworn to by the person required to file the same, using the form of affidavit therein contained, and the person required to file the report must make therein a full, truthful and complete disclosure of all the information required on the form and necessary to the full use thereof.

Executive Order No. 6980–C, promulgated under the Connally Act by the Secretary of the Interior and approved by the President March 1, 1935, provides, so far as pertinent:

> By virtue of and pursuant to the authority vested in me by the Act of Congress entitled "An Act to regulate Interstate and Foreign Commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", Public No. 14, 74th Congress, approved February 22, 1935, and the Executive Order of the President of the United States, No. 6979 (February 28, 1935), and pursuant to my order No. 1, this date promulgated thereunder; and
>
> WHEREAS, I find that large quantities of contraband oil, as defined in said Act of Congress, are originating in the East Texas Field * * *
>
> WHEREAS, I find that it is necessary and appropriate for the enforcement of the provisions of said Act to require certificates of clearance for petroleum and petroleum products moving or to be moved in interstate

commerce from said East Texas Field, and to establish a Board for the issuance of such certificates; and

WHEREAS, I find by reason of the matters and things hereinabove set forth that the regulations prescribed by my order No. 1 under said Act are necessary and appropriate for the enforcement of the provisions of said Act in said East Texas Field:

NOW, THEREFORE, it is ordered:

ARTICLE I

That part of the State of Texas included within the Counties of Gregg, Upshur, Smith, Rusk, and that part of Cherokee County covered by the Miguel de los Santos Coy, Pratt and Wesley Dikes Surveys (to be known as the East Texas Field) is hereby constituted a designated area within the meaning of Regulation II of my order No. 1 under said Act and Executive Order, and the regulations prescribed by said order shall apply to all petroleum and petroleum products originating in said area and to all persons producing, refining, processing, manufacturing, storing, shipping or transporting petroleum or petroleum products originating in said area.

ARTICLE II

I hereby appoint and designate Norman L. Meyers, Chairman, M. S. McCorquodale and John F. Davis to act as a Board to be known as Federal Tender Board No. 1, for the purpose of issuing certificates of clearance for such area under said Act and administering the regulations prescribed by my order No. 1 under said Act and Executive Order. The principal office of Federal

Tender Board No. 1 shall be located at Kilgore, Texas.

ARTICLE III

Federal Forms numbered 1, 2, 3 and 4, including the reverse sides thereof, copies of which are annexed hereto, are hereby approved and made a part of this Order as though fully set forth herein. Applications for certificates of clearance in the respective situations to which said forms are applicable, supporting affidavits for said applications, and returns by transporters shall be made on said forms in accordance with the instructions appearing on said forms.

ARTICLE IV

Federal Forms A, B, C and D, including the reverse sides thereof, copies of which are annexed hereto, are hereby approved and made a part of this Order as though fully set forth herein. Monthly reports by refineries, reclamation plants, casinghead gasoline plants, pipe lines and producers operating in the East Texas Field shall be made on said forms in accordance with the instructions appearing on said forms.

ARTICLE V

All terms defined in said Act or in my order No. 1 prescribed under said Act and Executive Order shall, when used in this Order or in the forms approved hereby, receive the definition given in said Act or Order.

ARTICLE VI

The operation of this Order shal lbegin at seven A. M., March 1, 1935.

APPENDIX B

The letter of the Secretary of the Interior dated May 2, 1934, to the Chairman of the Committee on the Judiciary, United States Senate, reads:

THE SECRETARY OF THE INTERIOR,
Washington, May 2, 1934.

Hon. HENRY F. ASHURST, *Chairman,*
Committee on the Judiciary,
United States Senate.

MY DEAR SENATOR ASHURST: There is transmitted herewith a draft of a proposed bill, providing a penalty for the knowing or willful presentation of any false written instrument relating to any matter within the jurisdiction of any department or agency of the Government.

This proposed bill is intended to reach the large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid.

I wish to call your attention to the fact that an attempt was made to secure legislation of this kind in the submission of Senate 2686, which bill passed the Senate February 20, but there was substituted therefor H. R. 8046, which bill passed both houses and was the subject of the veto of the President on April 17, on recommendation of the Department of Justice.

It is believed that the present bill is broad enough in terms to include all governmental agencies and the penalties have been increased to make it consistent with the penalties specified in Section 80 of the Criminal Code.

The early enactment of this legislation is highly desirable to this Department in order to secure prosecutions while expenditures are being made of Public Works Administration funds and during the life of the National Industrial Recovery Act of June 16, 1933, which expires by limitation two years after date of passage and is the source of the regulations under Section 9 (c) thereof, prohibiting the transportation of "hot" oil in interstate and foreign commerce.

It is respectfully requested that the proposed measure be placed before the Senate for appropriate action.

Sincerely yours,

(Sgd.) HAROLD L. ICKES,
Secretary of the Interior.

Inclosure 273941.

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CLERK

in the

UNITED STATES SUPREME COURT

October Term, 1940

No. 245

THE UNITED STATES OF AMERICA, *Appellant,*

VS.

J. W. GILLILAND, RALPH GILLILAND, FRED A. WILLIAMS, ET AL, *Appellees.*

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

The District Court concluded that no count of the indictment states an offense under the provisions of section 35 of the Criminal Code. (Sec. 80, Tit. 18, U. S. C.). Certain expressions of the court, appearing in his opinion, are made the basis of the errors assigned by the government, because, it is asserted, the views of the court, as evidenced by these expressions as to the meaning and intent of this statute, limit its scope to such an extent that the very purpose of the statute as amended June 18, 1934, is destroyed. As we see it, the reasons given for the conclusion that was reached,

are entirely immaterial. The question here is: Is the conclusion, that the indictment does not show that the defendants committed any acts that are prohibited by this statute, a correct conclusion? While we agree with the reasoning of the court in arriving at this conclusion, nevertheless the conclusion of the court is the only conclusion that could have been reached, under the facts alleged, whatever views may have been taken of the scope and effect of this statute. Indeed, if the court had gone so far as to adopt the interpretation contended for by the Government, that is, that the wording of the statute should be construed in conformity with what is said in the Report of the Senate Judiciary Committee, that the purpose of amending the statute is to reach a large number of cases involving the shipment of "hot" oil where false papers are presented in connection therewith, still the indictment would not state an offense under this statute. This is because there is not a single averment in the entire indictment that the defendants were engaged in the shipment of "hot" oil, or that the false affidavits, that they are charged in the first count with having conspired to make and use, and the false affidavits, that they are charged in the remaining counts, to have made and used, were to be presented, and were presented to the Federal Tender Board in connection with the shipment of "hot" oil.

If it were the intention of Congress by the amendatory Act to make criminal the use of false papers in

connection with the shipment of "hot" oil, in a charge for its violation, would it not be necessary in order to bring the case within that intention, to at least allege, in the conspiracy count, that the defendants conspired that they would present false papers in connection with the shipment of "hot" oil, and in the counts charging commission of that offense, that they presented false papers in connection with the shipment of "hot" oil? The answer seems obvious. We take it, therefore, that it follows, that the Government's contention, that the District Court erred in not sustaining the indictment under the view that the 1934 amendment was enacted for the specific purpose of making criminal the presentation of false papers in connection with the shipment of "hot" oil, is wholly untenable.

Now let us see what the other contentions are. As we understand counsel, they complain of the District Court holding that the general words employed in the 1934 amendment are restricted in their meaning to include and bring within their scope only acts that are of the same class and kindred to the acts that are enumerated in the statute. They do not make clear what, if any, restriction should be placed upon them, therefore we take it that it is their position that these general words should be given their literal meaning; and anyone who makes a false affidavit, statement or representation about anything that is within the jurisdiction of any department or agency of the United

States or any corporation in which the United States is a stockholder, has offended against this Act.

Counsel further contend that Regulation Number Fourteen, set out in their brief, issued by the President under the provisions of the Connally Act, (Sec. 715, Tit. 15, U. S. C.), required all oil producers in the East Texas field to make monthly reports as to their production to the Federal Tender Board; that this gave the Board jurisdiction to require such reports; that when the defendants conspired that they would make false affidavits that would relate to and cover the reports that were to be made to the Federal Tender Board by the Gilliland Refining Company, as is alleged in the first count, they conspired to make false affidavits about a matter within the jurisdiction of a governmental agency, and therefore such conspiracy was a conspiracy to violate Section 35. Likewise, it is asserted, that when the defendants made and caused to be made the false affidavits that are attached to and made a part of the reports set forth in the remaining counts, they made and caused to be made false affidavits in relation to matters, (the reports), within the jurisdiction of a governmental agency, and consequently they again offended against the provisions of Section 35. Let us see now if these contentions are sound.

Section 35 as amended by the Act of 1934, contains seven clauses. It might be convenient to the court for us to set it out by clauses, numbering them in their

order and italicizing the words that were added by the amendment. It is as follows:

(1) "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claims to be false, fictitious, or fraudulent;

(2) "Or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any matter within the jurisdiction of any department or agency of the United States or any corporation in which the United States of America is a stockholder;*

(3) "Or whoever shall take and carry away, or take for his own use, or for the use of another, with intent to steal or purloin, *or shall wilfully injure or commit any depredations against,* any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, *or any property which has been or is being made, manufactured, or constructed under contract for the War or Navy Departments of the United States;*

(4) "Or whoever shall enter into any agreement, combination, or conspiracy to defraud the government of the United States or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim;

(5) "And whoever having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or wilfully to conceal such money or other property shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt;

(6) "Or whoever being authorized make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000, or imprisoned not more than 10 years, or both.

(7) "And whoever shall purchase or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a

clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500, or imprisoned not more than two years, or both."

It is at once apparent that the acts charged do not come within the scope of the first, third, fourth, fifth, sixth, and seventh clauses, for these clauses deal with enumerated and specific acts that are not of the same class or kindred as the acts charged in the indictment. Therefore, these questions present themselves:

(1). Did not the Congress intend that the general terms employed in the second clause should relate to the things that are enumerated in the context of the Act and that this clause should be for the purpose of gathering up the things of the same class and kindred as those that are enumerated?

(2). Did Congress intend that the second clause should be lifted out of the statute, so to speak, and be made to stand alone, creating a multitude of new offenses that are entirely dissociated and distinct from the offenses enumerated in the context of the Act? Would it, so treated, be valid as a penal statute?

(3) Assuming that by the 1934 amendment Congress intended to prohibit the presentation and

use of false papers in connection with the shipment of "hot" oil, was not that part of the Act repealed by implication when Congress enacted what is known as the Connally Act, section 715, Title 15, U.S.C.A., which is a self-sustained and organic whole, equipped to effectuate the declared policy of Congress, covering in detail the entire subject of the shipment of "hot" or excessively produced oil in interstate commerce?

(4) Do the facts that are averred in the indictment show: (a) that the false affidavits which the defendants conspired to make and use and those that they made and used were in relation to a matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board; or, (b) that such false affidavits were to be made and used and were made and used in connection with the shipment of "hot" oil in interstate commerce?

(5) In a charge for having violated the provisions of the second clause of Section 35, is not the intent and purpose of the defendants to accomplish a purpose that this clause contemplates and prohibits, an ingredient of the offense; and should not that intent and purpose be averred in the indictment to support a conviction of an offense under its provisions?

(6) Is not Regulation Number Fourteen invalid because the President failed to make any finding that reports as to production of oil required by it, was necessary and appropriate to the enforcement of the Connally Act?

With the indulgence of the court, we now desire to give it our idea about these questions.

ARGUMENT UPON FIRST QUESTION

Did not Congress intend that the general terms employed in the second clause should relate to the things that are enumerated in the context of the Act and that this clause should be for the purpose of gathering up the things of the same class and kindred as those that are enumerated?

Section 35 of the Criminal Code was formerly section 5438 of the Revised Statutes, having been taken from an act approved March 2nd, 1863, entitled "An Act to Prevent and Punish Frauds Upon the Government of the United States." 12 Stat. 696. This section, after being once amended, 35 Stat. 555, was, upon the codification of the penal laws, adopted as section 35 of the Criminal Code. 35 Stat. 1088. Since then, it has been twice amended, first, by the Act of October 23rd, 1918, 40 Stat. 1041, and by the Act of June 18th, 1934. 48 Stat. 996. Prior to the 1934 amendment, the statute prohibited only the cheating and swindling the United States of its money and property. United States vs. Cohen, 270 U. S. 339, 70 L. Ed. 616; United States ex rel Starr vs. Mulligan, 59 Fed. (2) 200.

In construing a statute, in order to arrive at the intent of the Legislature, it is of course a well recognized rule that we must look to the circumstances prevailing and the existing evils that it was the purpose of the Legislature to suppress. It is manifest from the original Act, and its amendments, that the purpose of

Congress was to suppress the evil of cheating and swindling the government of its money and property. In 1918, the United States was at war, and in order to more effectively prosecute the war, the Fleet Corporation and other corporations were created as instrumentalities of the United States. By the creation of these corporations, a new avenue was opened to cheat and swindle the government with impunity by the simple process of cheating and swindling these corporations, as cheating and swindling corporations owned by the United States was not made an offense. Salas vs. United States, 234 Fed. (C.C.A.) 842. Therefore, it was to deal with this evil that Congress enacted the 1918 amendment to the statute for the protection of the government against this class of evildoers. United States vs. Bowman, 260 U. S. 92, 67 L. Ed. 149.

In 1934, the whole country was again in distress due to an economic depression. The Federal Government sought to relieve it by spending money, consequently its activities assumed greater proportions than ever before in our history. Various corporations were formed and administrative agencies established, such as the Reconstruction Finance Corporation, Home Owners Loan Corporation, Agricultural Adjustment Administration, Federal Housing Administration, Public Works Administration, Works Progress Administration, and so on ad infinitum. These corporations and agencies were all instrumentalities of the United States and were spending billions of dollars. It is a matter of common

knowledge that these vast sums of money were turned over to the borrowers and public beneficiaries upon showings made that they were entitled to the same under the acts of Congress and the rules and regulations made governing the expenditure of such money. These showings were necessarily made by representations, statements, affidavits, depositions, etc.; and in cases of public works where the Federal Government participated with the state or municipalities in the cost of such work, the payrolls, vouchers, and other evidences of expenditures were required as a basis for the Federal contribution. Under the Federal Housing Administration program, banks over the country would make loans to those who owned a lot and desired to build a house. The repayment of this loan would be guaranteed by the United States. Therefore, the borrower must make, through his bank, an application to the housing administration officials setting out all the facts as to the value of his lot, the cost of the house to be erected, etc. Upon this application, the housing administration official either approved or disapproved the loan. The approval carried with it the guarantee of the United States, and the bank then proceeded to make the loan. Therefore, it is not difficult to perceive of the very many new avenues that were thus opened through which the United States could be cheated and defrauded by the making and using of false statements, affidavits, payrolls, vouchers, etc., in connection with these matters; and injury to the United States could thus be worked without committing any of the

acts prohibited by the statute. So it was to meet and deal with this situation that the 1934 amendment became necessary.

To accomplish this, Congress reenacted section 35 in its entirety, with the exception of eliminating one clause, the subjects of which were dealt with in another clause which is retained, and added the three clauses which we have hereinabove pointed out. That Congress intended to broaden the statute so as to deal with those acts which worked injury to the United States that were not contemplated when the statute was amended in 1918, there can be no doubt. That is manifest by the two clauses that were added, which prohibit the wilful injury to any governmental property and the injury or commission of depredations against any property in the course of manufacture for the War and Navy Departments. The third clause added is that which, with the words of the old statute, constitutes the second clause of the present statute as we have hereinabove set it out; and, as we have seen, this clause is general and prohibits no specific or definite act, unless it is construed in connection with the subjects dealt with in the context of the statute. Giving it that effect, then the prohibitions contained in it refer to and deal with the subjects of cheating and swindling the government and the intent then becomes clear, for it empowers the government to more effectively deal with those subjects. Let us see if our conclusion in this respect is not correct.

In the 1918 amendment, the language used by Congress was general and prohibited the filing of false claims for payment or approval against any corporation in which the United States is a stockholder. Giving it a literal interpretation, a multitude of new offenses were created, for the filing of a false claim against any corporation in which the United States might own stock would be an offense against this statute. However, the Supreme Court held, in effect, that Congress by the use of this general language had no such intention; that it intended only to deal more effectively with the subjects dealt with in the statute, that is, cheating, defrauding, and swindling the United States, and, therefore, Congress intended that the language employed should be used in a limited sense and prohibit cheating and swindling of only those corporations like the Fleet Corporation that were instrumentalities of the government. United States vs. Walter, 263 U. S. 15, 68 L. Ed. 137.

When Congress enacted the 1934 amendment, it unquestionably intended that the general terms used by it should be constructed to apply only to the subjects of the statute, inasmuch as the general terms used in the 1918 amendment had been given that application. Mobile Trade Company vs. Lott, 12 Wall. 221, 20 L. Ed. 376; Greenleaf vs. Goodrich, 101 U. S. 278, 25 L. Ed. 845; Sewing Machine Company case, 18 Wall. 553, 21 L. Ed. 914. It can hardly be contended that Congress intended by the 1934 amendment to create a mul-

titude of new offenses entirely dissociated from the subjects dealt with in the statute that was amended.

In United States vs. Keitel, 211 U. S. 370, 33 L. Ed. 230, the court had before it an amendment to the pension statute. The statute, before amendment, prohibited the filing of false affidavits, statements, and representations with the pension commissioner. The amendatory statute, in repeating the original words, namely: "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the commissioner of pensions", adds to them the following, namely: "or of the Secretary of the Interior". It was contended by the United States that the statute, after the amendment, embraced not only acts done in connection with pensions or bounty land claims, but all acts of the prohibited character as to any matter coming before the Secretary of the Interior. On this question, the court said:

> "But to adopt this construction would cause the statute to create a multitude of new and substantive crimes wholly disconnected with claims for pension or bounty land, with which latter it was alone evidently the purpose of the original, as well as the amendatory statute, to deal. We think to state the proposition is, in effect, to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the

statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the commissioner of pensions. In other words, that the only purpose of the amendment was to more fully deal with the subjects with which the provision which was amended dealt, and not by way of amendment to legislature concerning every conceivable subject coming within the jurisdiction of the Secretary of the Interior. * * * Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of mere amendment to the section of the statute which was alone concerned with pension and bounty land claims."

The statute under consideration is not unlike the statute involved in the case of United States vs. Salen, 235 U. S. 236, 59 L. Ed. 210. In that case, the government, as in the case at bar, sought to create new offenses by a general clause of the statute, which, if given such an interpretation, would create offenses wholly dissociated from those enumerated in the statute. Upon this contention the court said:

"Such an interpretation would give an exceedingly liberal construction to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context, and violate the settled rule that words, which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be

interpreted in their narrower sense, and understood to refer to the things of the same nature as those described in the associated list, enumeration, or class. Virginia vs. Tennessee, 148 U. S. 519, 37 L. Ed. 543; United States vs. Chase, 135 U. S. 253, 34 L. Ed. 118; Neal vs. Clark (Neal vs. Scruggs), 95 U. S. 708, 24 L. Ed. 587."

ARGUMENT UPON SECOND QUESTION

Did Congress intend that the second clause should be lifted out of the statute, so to speak, and be made to stand alone, creating a multitude of new offenses that are entirely dissociated and distinct from the offenses enumerated in the Act? Would it, so treated, be valid as a penal statute?

Before entering upon our discussion, let us revert to the principles of the construction of penal statutes, as announced by this court, from the very beginning of our government to the present time.

In United States vs. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37, Chief Justice Marshall said:

> "The principle that a case which is within the reason or mischief of a statute is within its provisions cannot be carried so far as to punish a crime not enumerated in the statute."

In United States vs. Brewer, 139 U. S. 278, 35 L. Ed. 190, it is said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may

know what acts it is their duty to avoid. United States vs. Sharpe, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States vs. Lacher, 134 U. S. 624."

In United States vs. Resnick, 299 U. S. 207, 91 L. Ed. 127, it is said:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. United States vs. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; Fasolo vs. United States, 272 U. S. 620, 71 L. Ed. 443."

Therefore, with these principles in mind, let us examine the clause under consideration to see whether it is sufficiently definite and certain to inform one that he is violating its provisions if he makes and uses a false affidavit that relates to and covers a report, made by another, to the Federal Tender Board, a governmental agency, as to the amount of oil that he produced from his oil leases. For convenience, we here repeat this clause.

"Or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within

the jurisdiction of any department or agency of the United States or any corporation in which the United States of America is a stockholder;"

Now it is clear that such acts are not enumerated in this clause. Therefore, the question arises: Is the language used sufficiently definite and certain to inform one committing those acts that he is offending against its provisions? It will be seen that the prohibition is against the *making or using* of false affidavits in relation to a matter within the jurisdiction of a governmental department or agency, or corporation in which the United States is a stockholder. Under what circumstances and intent and purpose is the making of such false affidavit prohibited? Congress has not said. How or in what manner is its use prohibited? Congress has not said. What matters are or are not within the jurisdiction of the governmental departments and agencies and the corporations in which the United States is a stockholder? Congress has not said. Certainly the mere making of an affidavit that is false, although it be in relation to a matter within the jurisdiction of some department or agency of the United States, or some corporation in which it is a stockholder, with no intention to in any wise injure the United States, and with no intention to accomplish some purpose that the law prohibited, could not be an offense. Certainly, every use of a false affidavit that relates to a matter within the jurisdiction of some governmental department or agency or corporation in which the United

States is a stockholder, could not be criminal; yet there is no definition of the use so that one would be put on notice that to use such an affidavit in the manner defined would be a violation of the law.

The false affidavit, to come within the operation of the language of this clause, must be in relation to a matter within the jurisdiction of some governmental department or agency, or corporation in which the United States is a stockholder. The term "jurisdiction" is not a commonly understood word. Judges and lawyers understand the word to mean the power lawfully conferred upon one to declare the law. Webster's Dictionary defines "jurisdiction" as, first, the legal power, right, or authority to hear and determine a cause or causes. Second, authority of a sovereign power to govern or legislate; control. Third, sphere of authority. We take it that Congress, in employing that term, intended the latter definition. Nevertheless, what is and what is not within the sphere of authority of the governmental departments and agencies, and corporations in which the United States is a stockholder, is not so generally known and understood that one making an affidavit about a matter would know beforehand that he would incur the penalties of the law if the affidavit was false. This clause, standing alone as a statute creating new offenses that are distinct from and unrelated to those enumerated in the context of the statute, of which it is a part, is entirely too indefinite and uncertain, because there is no fixing by Congress of any ascertainable standard of guilt.

The questions of whether a matter about which a false affidavit had been made is, or is not, within the jurisdiction of a governmental department or agency, or corporation in which the United States owns stock, and whether such affidavit was used in an unlawful manner, are left open to the widest conceivable inquiry, and upon these questions different courts would most assuredly differ. An accused may be held for his act in one court and discharged in another. Such statutes have uniformly been condemned and held void. United States vs. Cohen Grocery Company, 255 U. S. 81, 65 L. Ed. 516.

In Connally vs. General Construction Company, 269 U. S. 385, 70 L. Ed. 322, it is said:

> "The terms of a penal statute creating new offenses must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. It is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Company vs. Kentucky, 234 U. S. 216, 58 L. Ed. 1284; Collins vs. Kentucky, 234 U. S. 634, 58 L. Ed. 1510. * * * "

The court continued, quoting with approval what was said in United States vs. Capital Traction Company, 34 App. D. C. 592:

" 'The dividing line between what is lawful and unlawful cannot be left to conjecture. A citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. A crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.' "

If Congress intended to create a multitude of new offenses by making it an offense for anyone to make or use a false affidavit about any matter within the jurisdiction of any department or agency of the government, or any corporation in which the United States is a stockholder, in doing so it would not attempt to create such offenses by the mere adding of a few words of general import to a statute that dealt only with cheating and defrauding the government of its money and the theft and destruction of its property. United States vs. Keitel, 211 U. S. 370, 53 L. Ed. 280.

ARGUMENT UPON THIRD QUESTION

Assuming that by the 1934 amendment Congress intended to prohibit the presentation and use of false papers in connection with the shipment of "hot" oil,

was not that part of the Act repealed by implication when Congress later enacted what is known as the Connally Act, section 715, Title 15, U. S. C. A., which is a self-sustained and organic whole, equipped to effectuate the declared policy of Congress, covering in detail the entire subject of the shipment of "hot" or excessively produced oil in interstate commerce?

It will be seen that the statute under consideration was amended on June 18, 1934. At that time, the National Recovery Act was being enforced. Section 9 (c) of that Act authorized the President to prohibit the shipment of oil produced in excess of the state law into interstate commerce. Acting under that purported authority, the President issued a proclamation prohibiting the shipment of excessively produced oil in interstate commerce, and designated the Secretary of the Interior as his nominee to make rules and regulations for the enforcement of his proclamation. On August 2nd, 1933, the Secretary issued a number of regulations on the subject, and among them is regulation 6, which provides as follows:

> "No transporting agency, either by rail, pipe line, water, motor vehicle, or any other means of conveyance, shall receive for transportation any petroleum or products thereof, unless the respective shippers and producers hereinafter described shall each furnish and the transporting agency or agencies shall receive in good faith and without reasonable grounds for believing that any fact stated is untrue, affidavits sworn to before any duly authorized state or federal officer, setting

forth the information required by this regulation for the respective shippers or producers."

Then follow the rules and classifications covering the furnishing of affidavits under this regulation, they being Class A, Class B, and Class C shipment. It is a matter of history that many false affidavits were made and furnished to the transporting agencies under the provisions of this regulation, in order to ship in interstate commerce excess or "hot" oil and the products thereof. Thus the supposed will of Congress, manifested through the proclamation of the President and the regulations of the Secretary of the Interior, was being circumvented and rendered ineffectual. So the Secretary, as the Government's brief shows, recommended that Congress enact some legislation to deal criminally with those culprits who evaded his orders in this fashion.

Whether the Senate Committee amendment dealing with the presentation of false papers in connection with the shipment of "hot" oil failed of enactment, or the Committee deemed that the general language used by it in connection with the words used in the old statute that now make up the second clause had the effect of dealing with that evil, seems now to be immaterial, for the Act of Congress, which the clause under consideration was intended as an aider to its enforcement, was declared unconstitutional and void by the Supreme Court in Panama Refining Company vs. Ryan, 293 U. S. 388, 79 L. Ed. 446, and it would seem that when that Act failed, the clause under

consideration, insofar as it was intended to aid in the enforcement of that Act, would become inoperative and of no further force and effect.

But however that may be, the clause under consideration, insofar as Congress may have intended it to deal with the shipment of "hot" oil in interstate commerce, was repealed by implication when Congress later, in February of 1935, enacted what is known as the Connally Act, section 715, Title 15, U. S. C. A., for the latter act embraces the entire subject of the transportation of excessively produced oil in interstate commerce and deals with it in all of its phases.

In United States vs. Neal Powers, 83 L. Ed. 792, the court, in discussing this Act. says:

> "This is an Act designed to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil, (as defined in the Act) and to encourage the conservation of deposits of crude oil within the United States. Administrative machinery is provided for the control of shipment or transportation of contraband oil in interstate commerce. * * * Penalties are provided for violations of the Act or any regulations prescribed thereunder. Secs. 6 & 7. And Section 10 implements the Act with civil and criminal procedures to enforce its sanctions. The Act is thus a self-sustained and organic whole, equipped to effectuate a declared policy of Congress."

In Cook County National Bank vs. United States, 107 U. S. 445, 27 L. Ed. 537, it is said:

> "A law embracing an entire subject, dealing with it in all of its phases, may thus withdraw a subject from the operation of a general law as effectively as though, as to such subject, the general law were in terms repealed. The question is one respecting the intent of the Legislature, and, although as a general rule, the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. Daviess vs. Fairbairn, 3 How. 836; United States vs. Tynen, 11 Wall. 88."

In United States vs. Yuginovich, 256 U. S. 450, the court said:

> "It is, of course, settled that repeals by implication are not favored . It is equally well settled that a later statute repeals former ones when clearly inconsistent with the early enactments. United States vs. Tynen, 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty."

In this connection, it will be noted that the maximum punishment for the violation of the statute under consideration is 10 years imprisonment and $10,000. fine, while the maximum punishment for the violation of the Connally Act is 6 months in jail and $2,000. fine. There-

fore, the Connally Act is clearly inconsistent with the Act under consideration under which the indictment is brought.

In United State vs. Windham, 264 Fed. 376, it is said:

> "The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with preceding statutes and covering the entire ground of the subject matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty when imposed in a later statute is presumed to supersede the earlier and heavier penalty."

In State vs. Tate, 171 Southern 108, the Supreme Court of Louisiana said:

> "While it is true that repeals by implication are not favored, it is equally true that, where the obvious purpose of the law is to cover the whole subject matter therein dealt with, it supersedes all prior pertinent legislation."

Many other decisions from other jurisdictions are to the same effect. United States vs. 1 Chevrolet Coupe, 9 Fed. Sup. 85; State vs. Dixie Finance Co. (Tenn.), 278 S. W. 59; Gay vs. Commonwealth (Ky.), 21 S. W. (2) 480; Russel vs. State (Miss.), 169 So. 654; State vs. Coblentz (Md.), 175 Atl. 34; Norton Johnson Buick Co. vs. Lindley (Okla.), 46 Pac. (2) 525; Varney vs.

City of Albuquerque (N.M.), 55 Pac. (2) 40. In the last cited case it is said:

> "A statute enacted for the primary purpose of dealing with a particular subject prescribing terms and conditions covering the subject-matter supersedes a general statute which does not refer to that subject although broad enough to cover it. This rule of construction is so well established that we content ourselves with citing a few of the cases at hand. Gardner v. School District, 34 Okl. 716, 126 P. 1018; Ulster County vs. State, 177 N. Y. 189, 69 N. E. 370; People ex rel, Fore vs. Mo. Pac. Ry. Co., 342 Ill. 226, 173 N. E. 816; Daniels v. State, 150 Ind. 348, 50 N. E. 74; City of Marshall vs. State Bank of Marshall, 60 Tex. Civ. App. 508, 127 S. W. 1083; Thomas v. Evans, 73 Ohio St. 140, 76 N. E. 862; Gilkeson v. Mo. Pac. Ry. Co., 222 Mo. 173, 121 S. W. 138, 24 L.R.A. (N.S.) 844, 17 Ann. Cas. 763; Townsend v. Little et al, 109 U. S. 504, 3 S. Ct. 357, 27 L. Ed. 1012; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349."

Counsel on page 32 of their brief say that if one makes and files with the Federal Tender Board a false affidavit as to the monthly production of his oil, as required by Regulation Number Fourteen of Executive Order Number 6980-B, promulgated on March 1, 1935, under section 5 of the Connally Act, he incurs the penalty provided in that Act for its violation or the violation of the regulations issued thereunder, the maximum of which is six months in jail and two thousand dollars fine. Counsel say that one so offending may also be proceeded against for the same act under sec-

tion 35, the maximum penalty of which is ten years in the penitentiary and ten thousand dollars fine. They say that the great disparity in the penalty of the two statutes for the same offense is no indication whatsoever that Congress intended when it enacted the Connally Act to make the penalty provided for therein to cover all violations under its provisions and regulations, but the penalties provided in the Connally Act are no more than a "cumulative or auxiliary" sanction. If counsel are correct, we then have the same offense created and punished by two distinct enactments, and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail and two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine. This court in the case of U. S. vs. Stever, 222 U. S. 157, L. Ed. 145, had something to say about such a contention by the Government. There, it was contended that the act committed by the defendant was made criminal under two separate statutes, and the District Attorney could at his election proceed under either enactment. Upon this contention this court said:

> "If, then, this indictment is also maintainable under sec. 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effectuate a scheme to defraud, indictable and punishable under either of two distinct provisions, and that the District Attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would

result in the anomaly of an offense created and punished by two distinct enactments. Under the one, the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissable under the other, and the accused is subject to a measure of punishment under one not possible under the other. Thus, under sec. 3894, and indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under sec. 5480. Under sec. 3894, one may be imprisoned not longer than one year, while under the other, he may be imprisoned for 18 months. Under sec. 3894, he is subject to indictment for any number of violations. Under the other, the indictment may only charge offenses to the number of three committed within the same six calendar months. No such purpose can be fairly said to have actuated Congress. The two sections are intended to prevent the use of the mail for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries, or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being, 'any scheme or artifice to defraud.' A scheme to defraud by means of false pretenses is, as we have seen, a 'scheme or artifice to defraud', within the plain meaning and purpose of this section. The general words, 'on concerning schemes devised for the purpose of obtaining money or property under false pretenses', found in sec. 3894, do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General. So construed,

they would trench upon the ground covered by sec. 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance and are followed by further particular words relating to the same kind of lottery schemes. *In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words.* * * * (Italics ours.) Construing the two sections together as legislation in pari materia, we find no manifest legislative intent forbidding the application of the rule of construction referred to. We therefore conclude that the words, 'or concerning schemes devised for the purpose of obtaining money or property by false pretenses', are to be limited to schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section. This view finds strong support in the case of United States vs. Sauer, 88 Fed. 249, where the opinion was by Judge Severns, then District Judge."

Therefore, the conclusion must be that although Congress may have intended, by the 1934 amendment of the statute under consideration, to deal with the subject of presentation of false papers in connection with the interstate shipment of "hot" or excessively produced oil, that statute, insofar as it dealt with that subject, was repealed by implication by the later enactment of the Connally Act.

ARGUMENT UPON FOURTH QUESTION

Do the facts that are averred in the indictment show: (a) that the false affidavits which the defendants conspired to make and use and those that they made and used were in relation to a matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board; or, (b) that such false affidavits were to be made and used and were made and used in connection with the shipment of "hot" oil in interstate commerce?

To answer this question, we need but refer to the facts averred in the various counts. Of course, there are many assertions contained in them that the affidavits which the defendants conspired to make and those that they did make were about a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board, but those statetments are merely conclusions of the pleader and cannot be taken into consideration in testing an indictment. The facts averred, and they only, can be taken into consideration. Now, then, what are the facts?

In the first count, it is alleged that the defendants conspired to make and use false affidavits that would *relate to and cover* certain reports that were to be made to the Federal Tender Board by the Gilliland Refining Company, neither it nor any of its officers being de-

fendants nor charged with any wrongdoing. The reports that the Gilliland Refining Company was to make to the Federal Tender Board are, first, Federal Form "D", Monthly Producer's Report, second, Federal Form "C", Monthly Pipe Line and Storage Report, and; third, Federal Form "A", Monthly Refinery and Reclamation Plant Report. It is not alleged that the reports were ever actually made by the Gilliland Refining Company to the Federal Tender Board, nor is it alleged what the false affidavits would contain relating to and covering said reports; nor is it alleged what said affidavits were to contain about matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board, and in what respect the affidavits were to be false regarding the jurisdictional subjects of these governmental agencies. Therefore, the effect and only effect of the facts plead in the first count is that the Gilliland Refining Company was to make certain reports to the Federal Tender Board about its production of oil, the amount of oil that it transported through its pipe lines and stored, and the amount of oil that it used in its refining operations; and that the defendants conspired that they would make false affidavits that would relate to and cover such reports.

There are no allegations that the reports that the Gilliland Refining Company was to make to the Federal Tender Board, and about which reports, it is charged, the defendants conspired to make the false affidavits,

were to be made or used by the Gilliland Refining Company, or the defendants, or anyone else, as a basis for, or in support of, or in connection with, any application to the Federal Tender Board for a certificate of clearance to ship the oil or products, the subject of the reports, in interstate commerce. Therefore, it follows that as to the first count, the facts averred wholly fail to state a case of conspiracy to make and use false affidavits about a matter within the jurisdiction of a governmental department or agency, or the presentation or use of false papers in connection with the shipment of "hot" oil in interstate commerce.

In the second count, it is averred that the defendants made and caused to be made, and used and caused to be used, the following affidavit:

"STATE OF TEXAS)
COUNTY OF GREGG)

Before me, the undersigned authority, on this day personally appeared F. Jones, known to me to be the person whose name is subscribed to this instrument, who, after being by me duly sworn, on oath, that he is the person in charge of superintending the production on all wells on the above property and is employed in the capacity of agent, and that said report contains no mis-statement or inaccuracy within the knowledge of the affiant; and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report; and that

said report is a correct statement of the facts therein recited.

(Signed) F. JONES

Sworn to and subscribed before me, this 20th day of April, 1935.

(Signed) E. P. WILLIAMS
Notary Public, Gregg
County, Texas

It is averred that the defendants made and caused to be made, used and caused to be used, and delivered to the Federal Tender Board, a report in writing designated as Federal Form "D", Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of March, 1935, from the oil wells located on the A. J. Sanders Lease, Upshur County, Texas; that said report was false in that there were produced from the wells upon the A. J. Sanders Lease, during the month of March, 1935, a greater quantity of oil than shown in the report. That the foregoing affidavit, which the defendants are charged with having made and caused to be made, was attached to and formed a part of said report.

Therefore, the sum and substance of all the facts averred in the second count is this and only this: That the defendants made and caused to be made a report to the Federal Tender Board in the name of Oil, Inc., as to the amount of oil produced during the month of March, 1935, from the A. J. Sanders Lease; that the

report was false because it did not contain the number of barrels actually produced; that the affidavit which the defendants caused Frank Jones to make, as hereinabove set out, was attached to said report. Therefore, the report being false, the affidavit was false.

The defendants are not charged with making a false report as to the amount of oil produced, but with making a false affidavit, which was attached to the report. There are no averments of fact which show that the affidavit is in relation to any matter within the jurisdiction of the department of the Interior, Secretary of the Interior, or the Federal Tender Board. Indeed, such a showing could not be made, because the facts alleged show that the affidavit, at most, related to nothing other than the amount of oil that was produced by Oil, Inc., from the A. J. Sanders Lease during the month of March, 1935. There is no allegation that the report was made or used as a basis or support for an application to the Federal Tender Board for a certificate of clearance to ship the oil described in the report in interstate commerce, or that the same was made and used, or intended to be used, in any connection whatsoever with the transportation of "hot" oil, or any other kind of oil, in interstate commerce.

Therefore, the facts averred in the second count wholly fail to state a case of making and using a false affidavit in relation to a matter within the jurisdiction of a governmental department or agency; and, likewise, the facts wholly fail to state a case of presenting

or using false papers in connection with the shipment of "hot" oil in interstate commerce.

The averments of fact in the remaining counts of the indictment are, in substance, the same as those of the second count, except that they cover different periods of time, and some of the affidavits are signed by other defendants. It is clear, therefore, that the facts in each and all of the counts of the indictment are insufficient to constitute the offense of conspiring to make and use, and making and using, false affidavits in relation to matters within the jurisdiction of a department or agency of the United States; and, likewise, the facts are insufficient to constitute the offense of making, presenting, and using false papers in connection with the shipment of "hot", or excessively produced, oil in interstate commerce.

ARGUMENT UPON FIFTH QUESTION

In the charge for having violated the provisions of the second clause of Section 35, is not the intent and purpose of the defendants to accomplish a purpose that this clause contemplates and prohibits, an ingredient of the offense; and should not that intent and purpose be averred in the indictment to support a conviction of an offense under its provisions?

An indictment in the words of the statute, where the statute defines all of the elements and ingredients of the crime, is sufficient; but where the statute consists

of generic terms, the acts, circumstances, and intent of the defendant must be sufficiently averred in the indictment to show that a crime was committed against such statute. The clause under consideration here is in generic terms. It prohibits the making or using of false affidavits in relation to a matter within the jurisdiction of governmental agencies, departments, or corporations in which the United States is a stockholder. Certainly the making of an affidavit that is false, and is in relation to a matter within the jurisdiction of such departments or agencies, would not, under all circumstances, be criminal; nor would every use of such affidavit constitute an offense. In order to constitute a crime the making and using of such false affidavit must be accompanied by an intent to accomplish an unlawful or forbidden purpose. Therefore, if the intent and purpose of making and using such a false affidavit is an ingredient of the crime, that intent and purpose must not only be alleged, but proven. If it is necessary that the intent and purpose be proven to support a conviction, it is certain that it must be alleged in the indictment, for every element that must be proven to support a conviction, must be charged.

In United States vs. Post, 113 Fed. 852, it is said:

> "The well established principle of criminal pleading which requires direct, positive, and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment, or recital; but

every fact necessary to constitute the crime must be directly and affirmatively alleged."

In Brenner vs. United States, 287 Fed. (C.C.A.) 636, it is said:

"The indictment must charge the offense in more than the generic terms as in the definition. It must descend to particulars. United States vs. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. A crime, unless otherwise provided by statute, is made up of acts and intent, and they must be set forth in the indictment with reasonable particularity as to time, place, and circumstances. Such particulars are matters of substance and not of form, and their omission is not aided or cured by a verdict. In United States vs. Hess, 124 U. S. 483, 31 L. Ed. 516, it is said: 'The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.'"

ARGUMENT UPON SIXTH QUESTION

Is not Regulation Number Fourteen invalid because the President failed to make any finding that reports as to production of oil required by it, was necessary and appropriate to the enforcement of the Connally Act?

The Government contends that Regulation Number Fourteen, promulgated by the President under the authority of Section 5 of the Connally Act, requires each producer in the East Texas oil field, although he

is not carrying on his business in interstate commerce, to file monthly reports as to his production of oil with the Federal Tender Board. It is asserted that this Regulation confers jurisdiction upon the Federal Tender Board to require such reports, and that when the defendants conspired that they would make false affidavits that would relate to and cover the reports that were to be filed by the Gilliland Refining Company they conspired to make false affidavits about a matter within the jurisdiction of an agency of the United States; and, likewise, when they made or caused to be made affidavits which were attached to and made a part of the reports which were false and filed with the Federal Tender Board, as set out in the remaining counts of the indictment, they made and caused to be made false affidavits about matters within the jurisdiction of an agency of the United States. Consequently, it is asserted that the acts of the defendants come within the condemnation of Section 35. Counsel also assert that the defendants may also be proceeded against criminally under the provisions of the Connally Act for having filed false reports in violation of Regulation Number Fourteen.

If Regulation Number Fourteen is valid, there is no doubt but that one who files a false report as to his oil production is liable under the provisions of the Connally Act. Section 5 of that Act authorizes the President, if he finds it necessary or appropriate for the enforcement of the provisions of said Act, to issue regu-

latiqns requiring reports as to production, storage, refining, transporting, etc., although those activities are no part of interstate transportation of petroleum and its products, which Congress has seen fit to regulate. Congress, having entered the field of prohibiting the interstate transportation of oil produced in excess of state authority, of course has the power to authorize the President, as to its delegate, to regulate, by regulations, activities that are wholly intrastate, if he finds as a fact that the regulation of such intrastate activities are necessary and appropriate to the enforcement of the interstate prohibition. But Congress clearly and plainly enjoined upon the President the duty of first finding, as a condition precedent, that it is necessary and appropriaate to the enforcement of its interdiction, that reports as to production, etc., be furnished, before he subjects those who are engaged wholly in intrastate activities to the operation of the Act. But the President, in issuing this Regulation, failed to make any finding whatsoever that reports as to production, refining, etc., are necessary and appropriate to the enforcement of the Act. Therefore, the Regulation is absolutely void, and any reports that the defendants may have filed with the Federal Tender Board under its requirements are of no consequence, and any false statement or representation that the defendants may have made concerning such reports could not be in relation to a matter within its jurisdiction.

In Panama Refining Company vs. Ryan, 293 U. S. 388, 79 L. Ed. 446, it is said:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

There is only one other question in this case; that is the action of the District Court in holding that the first count of the indictment contains sufficient averments to charge the defendants with having conspired to transport excessively produced oil in interstate commerce in violation of the Connally Act. We are doubtful whether this court will entertain our complaint as to the act of the court in this respect, but since the defendants will be subjected to prosecution under the first count, even though this court sustains the judgment of the District Court in otherwise dismissing the indictment, we thought it would be best to call this court's attention to our motion for a new trial in this regard, and our exception to the court's action in denying our motion, not being sure but that this court, having the whole case before it, may review the act of the District Court in this respect. And, if this court does review the act of the lower court in holding that the first count is sufficient to state the offense of conspiracy to transport excessively produced oil in inter-

state commerce, then, in that event, we invite the court's attention to the allegations of the first count, which clearly show that the lower court has fallen into error in holding that count good in that respect.

We think the District Court fell into error in reaching this conclusion, because it inadvertently overlooked the absence of averments showing that the defendants agreed to produce oil in excess of the amounts permitted by the laws of Texas and the rules and regulations of the Railroad Commission made thereunder, and that they agreed to transport the same, or the products thereof, in interstate commerce, which is essential to the stating of an offense under the Connally Act. But before taking this up, let us refer to the Connally Act and see what contraband oil is and what is prohibited from interstate commerce. The pertinent provisions of this statute are as follows:

"Sec. 715a.

(1) The term 'contraband oil' means petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a state or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state, or any of the products of such petroleum."

"Sec. 715b. Interstate transportation of contraband oil forbidden.

The shipment or transportation in interstate commerce, from any state, of contraband oil, pro-

duced in such state, is hereby prohibited. For the purposes of this section, contraband oil shall not be deemed to have been produced in a state if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such state, or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state."

Now it is seen that the Act does not prohibit the interstate transportation of all "contraband oil". There are four commodities defined as "contraband oil", namely: (1) petroleum that has been produced in excess of the state authority; (2) petroleum that has been transported in excess of the state authority; (3) petroleum that has been withdrawn from storage in excess of the state authority; (4) the products of petroleum produced or transported or withdrawn from storage in excess of the state authority. But the prohibition against interstate shipment applies to only that petroleum, or its products, that has been produced in excess of the state authority. Therefore, for the first count of the indictment to be sufficient to charge the defendants with the offense of having conspired to transport into interstate commerce contraband oil in violation of the Connally Act, it is obvious that the averments must show that the defendants conspired and agreed that they would transport from the State of Texas into interstate commerce, petroleum or its

products which was produced in Texas in excess of the laws of Texas, or the regulations or orders prescribed thereunder by the Railroad Commission of Texas, which is the agency authorized by the laws of Texas to fix production quotas.

This, we say, is not shown by the averments. Let us see if we are not correct. Omitting the formal allegations and the names of the defendants, it is averred that the defendants "did, to-wit, continuously from on or about March 1, 1935, up to on or about January 1, 1938, unlawfully, knowingly, fraudulently, wilfully, and feloniously agree, combine, confederate, and conspire among themselves and with each other to commit divers and sundry offenses against the laws of the United States of America, to-wit:". The pleader then particularizes and states what the defendants agreed to do: "To knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, false affidavits relating to matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, knowing the same to contain fraudulent and fictitious statements, the said Department of the Interior, and the said Secretary of the Interior, and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a governmental department and agency of the United States."

The remaining averments of the count are but recitals descriptive of the details of the conspiracy to make and use false affidavits in relation to matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior and the Federal Tender Board, and cannot be considered as a charge.

But if they may be so considered, let us see what these averments contain. We quote:

> "The Grand Jurors further present that a more definite description of the unlawful agreement and conspiracy to commit said offenses in violation of the laws of the United States is as follows: That certain of said defendants would produce and cause to be produced oil from certain leases, hereinafter described, situated in Gregg and Upshur Counties, Texas, and within the jurisdiction of this court, which oil would be produced in violation of the laws of Texas, and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases. Certain others of said defendants were to, without lawful authority and without approved tenders or permits of the Railroad Commission of Texas, or Federal Tender Board No. 1, Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg County, Texas, or cause the same to be done; and certain others of said defendants were to refine said unlawfully produced oil so transported, and manufacture it into contraband products at said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of said defendants were to sell, ship,

and deliver into interstate commerce, the said contraband products so manufactured, and cause the same to be done without lawful authority and in violation of the laws of the United States."

The remaining averments are that the defendants would make false affidavits in relation to matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and Federal Tender Board No. 1, Kilgore, Texas, which would relate to certain designated reports as to the production of oil, the transportation of oil, and refining operations, which reports were to be made to the Federal Tender Board by the Gilliland Refining Company. But it is clear, these averments merely amplify the averments immediately following the charge and explaining it, namely, that the defendants conspired that they would make and use false affidavits in relation to matters within the jurisdiction of these governmental agencies. As the court has held these averments state no offense, they will not be considered further, and we will confine our discussion to those averments which we have just quoted, wherein the allegations pertain to the agreement to produce, transport, and refine unlawful oil and ship the products thereof in interstate commerce.

As we see it, if it had been directly charged that the defendants conspired to commit the acts set forth in the averments which we have quoted, still no offense would be stated. Why? Because it is nowhere averred that the defendants agreed that they would produce petroleum in excess of the amounts permitted to be

produced by the laws of Texas, or the regulations or orders of the Railroad Commission, prescribed thereunder, and transport such petroleum or the products thereof, in interstate commerce. The averment is that some of the defendants would produce oil "in violation of the laws of Texas and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases". This is not an averment of any facts, but a mere conclusion of the pleader, and ought to be disregarded.

But assuming that this statement may be considered as a statement of fact, and taken as a charge, the charge then is: "That the defendants agreed that they would produce oil in violation of the laws of Texas and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases." It is at once apparent that this does not charge the defendants with having agreed to produce contraband oil, as defined by the statute, simply because it is not averred that the oil, which they agreed to produce, would be in excess of the amounts permitted to be produced by the laws of Texas, or the rules and regulations of the Railroad Commission prescribed thereunder.

It is merely alleged that they agreed to produce oil in violation of the laws of Texas and the rules and regulations of the Railroad Commission; but it does not follow from this that, in producing oil in violation of

the laws of Texas and the rules and regulations of the Railroad Commission, that the production would be in excess of such laws and regulations; nor does it follow from the statement that the oil was to be produced in excess of that permitted to be produced from the wells on said leases, that the defendants agreed to produce amounts of oil from said wells in excess of that allocated to them by the regulations of the Railroad Commission, acting under the laws of Texas. How and in what manner the production was to be in violation of the laws of Texas and the rules and regulations of the Railroad Commission is not shown, nor is it shown how or in what manner the production, which the defendants agreed upon, would be in excess of that permitted to be produced from the wells on said leases, or what authority the defendants agreed to exceed in the amount of oil that they would produce from the wells on said leases.

There are many ways that oil may be produced in violation of the laws of Texas and the rules and regulations of the Railroad Commission, and yet the oil so produced is not contraband oil within the definition of Congress. As an illustration, if oil is produced from a well without tubing having been placed therein; or where the stock tanks, in which the oil is stored, are not on the same lease upon which the well is situated; or if the flow lines from the well to the tanks are not connected directly with the tanks; or if a permit to drill the well at the location where it is drilled, has

not first been obtained; the production in all of such instances is unlawful production, yet it may not be in excess of the quota of production fixed by the Railroad Commission, and, therefore, does not come within the definition of contraband oil, and its transportation in interstate commerce is not prohibited. It therefore cannot be implied from the averment that the defendants agreed that they would produce oil in violation of the laws of Texas and the rules and regulations of the Railroad Commission, and in excess of that permitted to be produced from the wells on said leases, that they agreed to produce oil in excess of the production quota fixed by the regulations of the Railroad Commission under the laws of Texas. But if such could be implied, such implication could not be resorted to to supply an essential ingredient of the offense, which the defendants are sought to be charged with having conspired to commit. Brenner vs. United States, supra; United States vs. Hess, 124 U. S. 483, 31 L. Ed. 517.

In the last cited case, it is said:

> "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital."

In United States vs. Eisenminger, 16 Fed. (2) 816, it is said:

> "It is, of course, horn book law that an indictment must charge each and every element of an

offense. United States vs. Standard Brewery, 251 U. S. 210, 64 L. Ed. 229. To be sufficient, it must show on its face that an offense has been committed. In a conspiracy indictment, it must appear that the defendants conspired, either to commit an offense against the United States, or to defraud the United States. With the latter, we are not here concerned. A conspiracy indictment must, therefore, show that the act agreed to be done embraced all the elements essential to constitute an offense against the United States. Obviously, a conspiracy indictment is not sufficient if it appears upon its face that one or more of the elements of an offense are wanting in the acts agreed to be done. See Clark's Crim. Proc. (2nd Edit.) p. 181."

It follows, therefore, that the averments of the first count are wholly insufficient to show that the defendants conspired to commit acts which would be in violation of sec. 715, Title 15, U. S. C. A., known as the Connally Act.

CONCLUSION

For the reasons above set forth, we respectfully submit that the judgment of the District Court in holding that the indictment states no offense under the provisions of Section 35 of the Criminal Code should be affirmed. And if the court considers our assignment as to the action of the lower court in holding that the first count states an offense of conspiracy to transport excessively produced oil in interstate commerce, then,

in that event, the judgment of the District Court in this respect be reversed with direction that the indictment be dismissed, and the defendants discharged.

Respectfully submitted,

F. W. FISCHER,
Tyler, Texas,
Attorney for Appellees.

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SUPREME COURT OF THE UNITED STATES.

No. 245.—October Term, 1940.

The United States of America, Appellant, *vs.* J. W. Gilliland, Ralph Gilliland, Fred A. Williams, et al.	Appeal from the District Court of the United States for the Eastern District of Texas.

[February 3, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The District Court sustained a demurrer to ten counts of an indictment and the Government appeals. 18 U. S. C. 682.

There were eleven counts in the indictment, the first of which, a conspiracy count, the District Court found good. The other counts now before us were based on Section 35 of the Criminal Code. 18 U. S. C. 80.[1] Eight of these counts charged in substance that defendants had willfully caused to be made and used verified reports falsely and fraudulently stating the amount of petroleum produced from certain oil wells, and the other two counts made a similar charge with respect to verified reports as to the amount of petroleum received from certain producers.

The District Court held that these substantive counts did not state an offense under Section 35 of the Criminal Code as amended by the Act of June 18, 1934. 48 Stat. 996. The court plainly rested its decision upon its construction of the statute and hence direct appeal to this Court is properly brought. We are concerned only with the correctness of this construction and not with the mere interpretation of the indictment as a pleading. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Borden Co.*, 308 U. S. 188, 195.

Section 35, as amended, makes it a crime knowingly and willfully to "make or cause to be made any false or fraudulent statements or representations', or to "make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, af-

[1] See Act of April 4, 1938, c. 69, 52 Stat. 197.

fidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States''. The reports containing the alleged false and fraudulent statements in this instance were charged to have related ''to a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas''.

By the Act of February 22, 1935, 49 Stat. 30, 31,[2] the so-called ''Hot Oil'' Act, the transportation in interstate commerce from any State of ''contraband oil'' produced therein was prohibited, such oil being that ''produced, transported, or withdrawn from storage'' in excess of the amounts permitted under the laws of the State or regulations duly made by its agencies. The President was authorized to prescribe regulations for the enforcement of the Act, including the requirement of ''reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products''. Under this authority the President designated the Secretary of the Interior as his agent, and the latter promulgated regulations which the President approved. There was thus set up Federal Tender Board No. 1, to be located at Kilgore, Texas, for the East Texas Field and monthly reports on forms approved by the Secretary were required to be filed with the Board.[3]

If the provision of Section 35, under which the indictment is laid, be construed according to its literal and natural import, it is manifest that the statute covers the offenses charged in the substantive counts. The affidavits and reports, as described in the indictment, containing statements alleged to be false and fraudulent, were made and used in a matter within the jurisdiction of a department and agency of the United States. Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required had been sufficiently described and the duty enjoined had been adequately defined. Any one presenting the required affidavits and reports to the Board set up under the pertinent regulations was suitably charged with notice of the consequence of knowingly and willfully including therein any false and fraudulent statements.

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[2] 15 U. S. C. 715-715d.

[3] Executive Orders No. 6979, issued February 28, 1935; No. 6980-B, Regulation XIV, approved March 1, 1935; No. 6980-C, approved March 1, 1935.

Defendant's contention, which the District Court sustained, is that the broad langugae of the statutory provision here involved should be restricted by construction so as to apply only to matters of a nature similar to those with which other provisions of Section 35 deal, "'such as claims against, rights to, or controversies about funds involved in 'operations of the Government' ", that is, to matters in which the Government has some financial or proprietary interest. This contention is sought to be supported by the doctrine of *ejusdem generis* and the construction given to Section 35 prior to the amendment of 1934, and by reference to the incongruity of the penalty prescribed for violation of Section 35 as contrasted with the penalty prescribed by the Act of February 22, 1935, to the enforcement of which the requirements in question were directed. Defendant also presents the contention, upon which the District Court did not pass, that the Act of February 22, 1935, was intended to cover the entire subject of the exclusion of "hot oil" from interstate commerce and consequently operated as a repeal of all other provisions dealing with that matter.

Before the amendment of 1934, Section 35, after referring to the presentation of claims against the government which were known to be false or fraudulent, provided:

"or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry: . . . shall be fined not more than $10,000 or imprisoned not more then ten years, or both".[4]

Distinguishing that provision from Section 37, the conspiracy section of the Criminal Code which by its terms extended broadly to every conspiracy "to defraud the United States in any manner or for any purpose",[5] this Court held that Section 35 which used

[4] 40 Stat. 1015.

[5] See Haas *v.* Henkel, 216 U. S. 462, 479; Hammerschmidt *v.* United States, 265 U. S. 182, 188.

the word "defrauding" in connection with "cheating and swindling" should be construed "as relating to the fraudulent causing of pecuniary or property loss" to the government. And that meaning was deemed to be emphasized by the context found in other provisions of Section 35. *United States* v. *Cohn*, 270 U. S. 339, 346, 347.

The Act of June 18, 1934,* amended Section 35 so that in place of the portion quoted above there were substituted these words:

"or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; . . . shall be fined" etc.

The amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States". In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. "The rule of 'ejusdem generis' is applied as an aid in ascertaining the intent of the legislature, not to subvert it when ascertained". *Texas* v. *United States*, 292 U. S. 522, 534.

* 48 Stat. 996.

If the language of the amended section could be deemed ambiguous, the legislative history of the amendment would dispel any doubt as to the congressional purpose. Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under Section 9(c) of the National Industrial Recovery Act of 1933[7] with respect to the transportation of "hot oil". The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had "for the presentation of false papers".[8] The bill which was passed by Congress, however, was amended in its final stages so as to require "intent to defraud the United States".[9] This bill was returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill.[10] Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to "hot oil". A bill was then passed and approved which included, with other amendments of Section 35, the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been caused.[11] The report of the Judiciary Committee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the purpose "of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith".[12]

The fact that the Secretary of the Interior was then seeking aid in the enforcement of Section 9(c) of the National Industrial Recovery Act, which this Court later found to be invalid (*Panama*

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[7] 48 Stat. 195, 200.

[8] See letter of the Secretary of the Interior to the Chairman of the Judiciary Committee of the Senate dated February 7, 1934. S. Rep. No. 288, 73d Cong., 2d sess.; 78 Cong. Rec., Pt. 3, p. 2859. See, also, H. Rep. No. 829, 73d Cong, 2d sess.

[9] 78 Cong. Rec., Pt. 4, pp. 3724, 3725; Pt. 6, p. 5746.

[10] 78 Cong. Rec., Pt. 6, p. 6778.

[11] 78 Cong. Rec., Pt. 10, pp. 11270, 11271; Pt. 11, p. 11513. Act of June 18, 1934, 48 Stat. 996.

[12] S. Rep. No. 1202, 73d Cong., 2d sess.

Refining Company v. *Ryan*, 293 U. S. 388), in no way affects the present application of the statute. Its provisions were not limited to the enforcement of Section 9(c) of the National Industrial Recovery Act but were enacted with appropriate breadth so that they at once applied to the presentation of affidavits, reports, etc., required by the subsequent Act of February 22, 1935, and the regulations duly prescribed thereunder.

In the light of the text of the Act of 1934, amending Section 35, and its legislative history, it is also clear that the fact that the penalty prescribed by Section 35 was greater than that fixed by the Act of February 22, 1935, has no significance in connection with the construction and application of the former. The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations.

Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal Section 35 as amended in 1934, so far as the latter applied to affidavits, documents, etc., presented in relation to "hot oil". There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in Section 35. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503, 504; *United States* v. *Borden Company*, 308 U. S. 188, 198, 199.

The judgment sustaining the demurrer to counts 2 to 11, inclusive, is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration and decision of this case.